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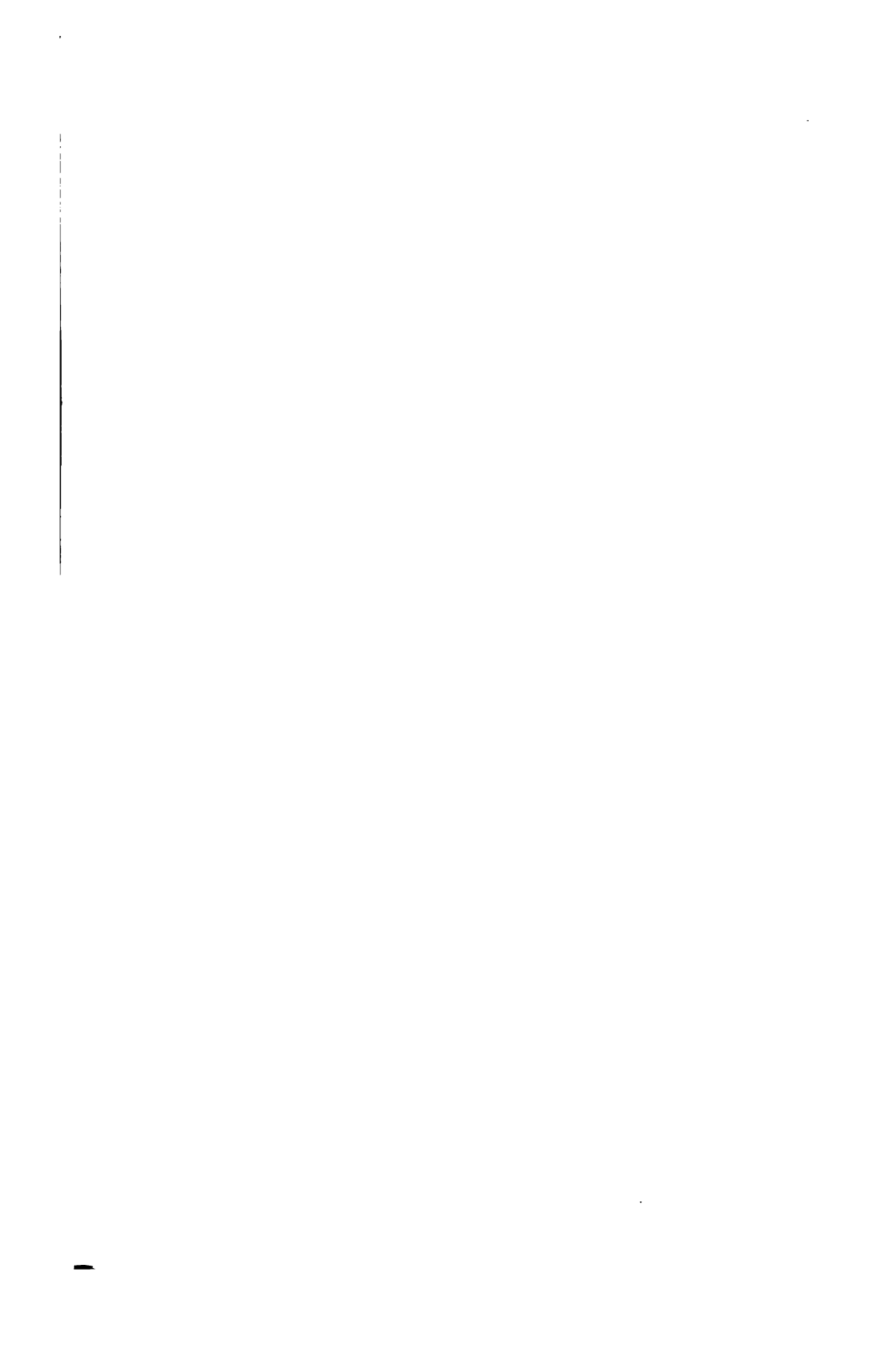
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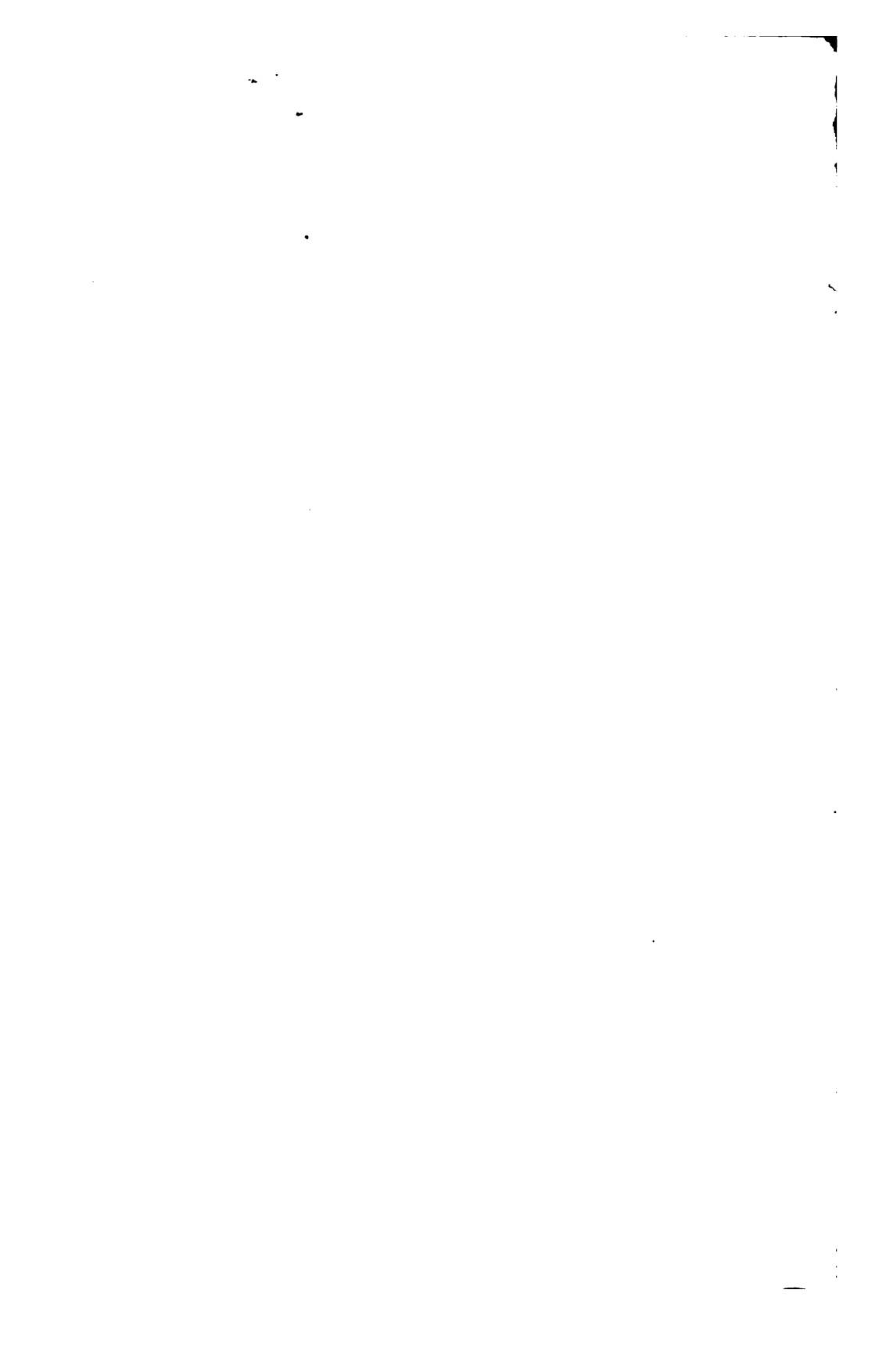
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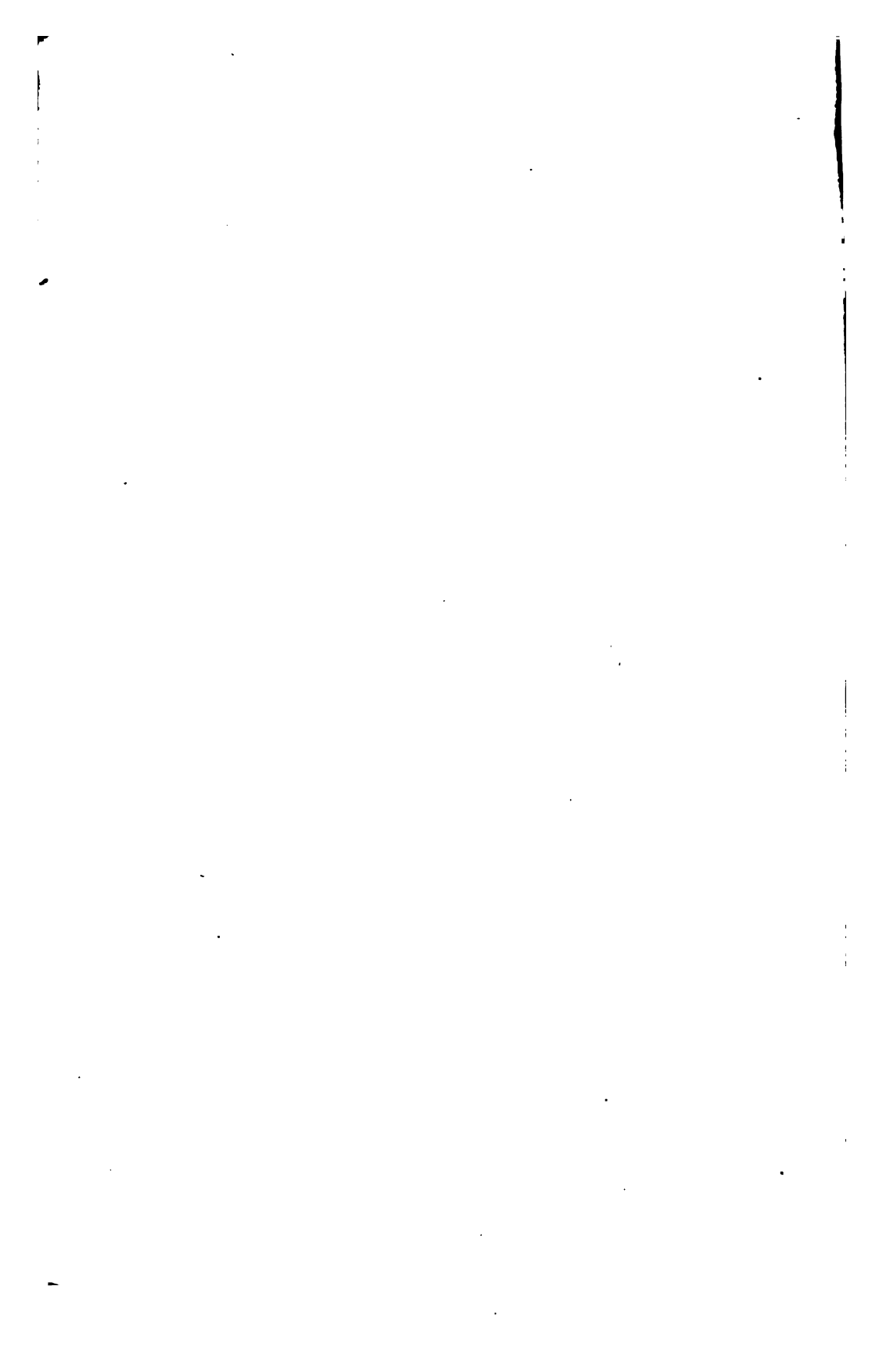


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REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF COLORADO,

CONTAINING

CASES DECIDED AT THE DECEMBER TERM, 1885, APRIL
TERM, 1886, OCTOBER TERM, 1886, AND
DECEMBER TERM, 1886.

BY L. B. FRANCE.

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DAVID ATWOOD,
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JUSTICES OF THE SUPREME COURT
OF THE
STATE OF COLORADO.

WILLIAM E. BECK, CHIEF JUSTICE.

JOSEPH C. HELM, }
SAMUEL H. ELBERT, } ASSOCIATE JUSTICES.

JAMES A. MILLER, CLERK.

ALVIN MARSH, ATTORNEY GENERAL.

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CASES AT LAW AND IN CHANCERY

DETERMINED IN THE

SUPREME COURT OF THE STATE OF COLORADO.

DECEMBER TERM, 1885.

BURR ET AL. V. CLEMENT ET AL.

1. When goods in the hands of an assignee are attached by a creditor of the assignor, and the assignee interpleads, he is deemed to admit *prima facie* the legal possession of the attaching creditor, and the burden is upon the interpleading claimant to show a superior title in himself.
2. In the absence of statutory prohibition, an assignor has the right to make such provision for the payment of attorney's fees for the necessary and proper execution of the trust; he may appoint an attorney, even his own attorney, assignee.
3. Though the law does not favor preferences, it tolerates them, and in the absence of interdicting statutes, a debtor has the right to make preferences in respect to his creditors.
4. A necessary consequence of all assignments is to hinder and delay creditors to a certain extent.
5. The hindering and delaying meant by the law as vitiating an assignment is that hindrance and delay intended to be produced by the assignor through covin and malice, or for his own benefit and advantage.

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6. In such cases the question of fraudulent intent is a question of fact and not of law, but the court is not deprived of the power to pronounce the judgment of the law in any case upon the facts disclosed, whenever the duty so to do becomes apparent.
7. Whenever an assignment contains provisions which are calculated *per se* to hinder and delay or defraud creditors, although the fraud must be passed upon as a question of fact, it nevertheless becomes the duty of the court to set aside the finding if in opposition to the plain inference to be drawn from the face of the instrument.

Error to County Court of Arapahoe County.

THE facts are stated in the opinion.

Mr. JOHN W. HORNER, for plaintiffs in error.

Messrs. BENEDICT and PHELPS, for defendants in error.

STONE, J. The principal question in this case involves the validity of an assignment made for the benefit of creditors. On the 29th of November, 1880, one David Cairns made an assignment of his effects to the plaintiff in error, Burr, for the benefit of his creditors. The said assignee immediately took possession of the property assigned, the principal portion of which consisted of a stock of goods contained in a store in the city of Denver, and which merchandise is the subject of the contention in this case. After taking possession of the goods, the plaintiff in error put out his sign as assignee, took an invoice of the stock, and proceeded to sell the goods both at private sale and at auction, and continued so to do from the date of the assignment until the 8th of December, 1880; being personally in charge of the goods and business most of the time each day. On the date last mentioned, the defendants in error, claiming to be creditors of Cairns, the assignor, sued out of the county court an attachment against Cairns, placed it in the hands of the sheriff, which officer on the same day levied upon and took into his possession the goods then in the store, and in the possession of said assignee under the assignment.

The plaintiff in error filed his interplea in said court, claiming the goods in question as assignee as aforesaid, and issue was joined upon the interplea. The goods so levied upon were inventoried by the sheriff at the time of the seizure at \$1,880. The cause afterwards coming on for hearing, before a jury impaneled to try the issues joined on the interplea, evidence was heard on the part of the assignee, as interpleader, of the facts relating to the assignment, and what was done thereunder, and under the attachment as stated above, and it also appeared in testimony that Burr, the said assignee, was, at the time of the assignment, a clerk in the office of J. W. Horner, Esq., one of the attorneys of Cairns, the assignor.

The deed of assignment was offered in evidence on behalf of said interpleader, but was objected to by the other side, and the court, sustaining the objection, rejected the deed as evidence in the cause.

The defendants in error then moved to strike out all the testimony given in the case as to what was done under the assignment, which motion was granted, and the jury instructed to disregard said testimony. The defendants in error offered no evidence whatever in the case, whereupon the court directed the jury to find a verdict for said defendants in error, and to find the property in them, which verdict was accordingly given by the jury from their box, and judgment was rendered by the court in accordance therewith. Exceptions to these several rulings of the court were duly taken by plaintiffs in error, motion for new trial made and overruled, etc. The errors assigned go to these rulings of the court in the rejection and striking out of evidence, and in directing the verdict of the jury.

The first point made and discussed by counsel for plaintiff in error is that, since defendants in error offered no evidence in the case of any indebtedness of Cairns to them, they were not entitled to the judgment, irrespective of the character of the assignment; that possession of

the goods in the assignee at the time of seizure under the attachment was *prima facie* evidence of right of possession, and this presumptive right was not overcome by any evidence of right in the attaching creditors, for that, until they had shown a debt existing from Cairns to them, they were not in a position to question the claim of the assignee. Several authorities are cited to this point, but upon examination we do not find that they sustain the position claimed here. The correct view, as it seems to us, is that the interpleader in such case, by interpleading, is deemed to admit *prima facie* the legal possession of the attaching creditor, and sets up a right in himself to overcome the presumptive or supposed right founded upon the legal process of the attachment proceeding; the burden of proof is upon the interpleading claimant to show a superior right in himself; if he fails in this, it leaves the possession and presumptive right thereof in the attaching creditor, as at the beginning of the contest upon the interplea.

The first presumption of right founded upon the possession of the assignee prior to the attachment is shifted to the attaching creditor as soon as the property in controversy is by the attachment process taken into the custody of the law, and the burden of proof is therefore cast upon the interpleading claimant. Such interpleading claimant can have no interest in the contest as to an indebtedness between the attaching creditor and the attachment debtor other than the casual interest which, by the statutory procedure, brings him in as a third party to try his individual right as a claimant of the property in controversy. In this case the attachment debtor, Cairns, filed no plea, and hence it is claimed that, if the interpleader failed to establish his right to the property in question, the attachment creditor was entitled to judgment as on a default. Whether, in such a case, judgment by default should have been regularly taken and entered is a question not pertinent to our present inquiry.

For the reason of the rule that in such cases the interpleader, by his interpleading, is deemed to have admitted the facts of the relationship between the attachment creditor and his debtor, see *Harrison v. Singleton*, 2 Scam. 21; *Dexter v. Parkins*, 22 Ill. 144.

The objections made to the deed of assignment are that Burr, the assignee, was a clerk in the office of Mr. Horner, one of the attorneys of Cairns, the assignor, and also because of the following provisions contained in the assignment deed, to wit: "In trust, nevertheless, for the uses and purposes following; that is to say, to sell and dispose of, collect, recover and receive the said properties, moneys and effects, and generally to convert the same into money, and, after defraying all lawful costs, expenses and charges for execution and carrying into effect the trust hereby created, then to apply the said moneys and proceeds as follows: 1. To the payment of reasonable attorneys' fees, due and to become due, to J. W. Horner and G. C. Norris for professional services rendered, or to be rendered, for the benefit of the property assigned."

It is contended by counsel for defendants in error that, by reason of the foregoing provisions in the deed, and the relation of the assignee to the attorneys of the assignor, as above stated, the assignment was fraudulent and void upon its face; that the evidence as to the facts in the case was all on one side, admitted by the other side, and therefore presented no question of fact to be submitted to the jury; that it was a case of fraud in law, and not of fact; that it was, therefore, a question of law for the court to determine, and that, the instrument being held void, the evidence of what was done under it went for nothing, and was properly stricken out.

As a reason for holding the deed of assignment void, it is insisted that the relations of the assignor and assignee, to the attorneys named, as preferred creditors for services rendered and to be rendered in and about the matter of

the property assigned, are a restriction upon the acts of such assignee; and authorities are cited to the effect that the assignment must be unconditional and unrestricted; that here the judgment and discretion of the assignee are not free from control by the attorneys of the assignor; that this provision as to the attorneys tends to hinder and delay creditors, since they cannot be paid until the fees are paid to said attorneys for services of future and indefinite extent and value, and in respect to litigation which the very terms of this assignment would tend to protract.

In support of the holding of the court below that the deed was void for the reasons stated, counsel for defendants in error rely chiefly upon the case of *Mead v. Phillips et al.* 1 Sandf. Ch. 83, where a deed of assignment was held fraudulent, as against creditors, because, among other objectionable provisions, it contained a clause, succeeding the direction for the payment of the several classes of creditors, in the following words: "Excepting, nevertheless, in all cases, the right of payment, and deducting from the payments hereinbefore provided for to be made, all the expenses necessarily incurred in the execution of this trust; and also to retain out of the proceeds of this assignment all costs and expenses necessarily incurred by me or my assigns hereinbefore named in defending any suits that may hereafter be instituted against me or them, or either of them, by any creditor or other person or persons for any matter or thing growing out of, or in any way connected with, this assignment."

In commenting upon this provision of the deed the chancellor remarks: "It is a standing notice to all creditors that any effort which they make to question the amount due to them, or to others, as stated in the assignment, or to compel its execution, will be resisted by the debtor; that he will contest such efforts to the end of the law, and will then subtract the costs and expenses in-

curred by him in so doing from the fund to which they were looking for a dividend."

An examination of that case shows, as the chancellor found, that the whole transaction was saturated with fraud. But that the chancellor did not entertain the opinion or hold that an assignment would be rendered void merely because it authorized the assignee to pay counsel for services rendered for the benefit of the trust or in its proper execution, is evident not only from an examination of that case but also from what is said by the same court in another case, where, in reference to a clause constituting the assignee the attorney of the assignor, and empowering him, "in his or their names, or otherwise, to commence, continue, maintain and prosecute to effect, and also to defend all law, equity and other proceedings which they may deem necessary to the execution of the said trusts," the chancellor says: "I do not perceive in this provision any marked evidence of fraud, nor, indeed, much that the assignee could not have done if the whole clause had been omitted." *Van Nest v. Yoe et al.* 1 Sandf. Ch. 4.

Upon the hearing of this case below, Mr. Norris himself testified that he and Mr. Horner had been Cairns' attorneys previous to this case; that several other cases were in litigation and still undecided, but there was no evidence that Cairns was indebted to them for services in such other cases, or that any payment for future services therein was intended to be embraced in the provision of the deed referred to, and, so far as the evidence goes, it may well be questioned whether anything appears, either in the deed or outside of it, which is inconsistent with the meaning that the attorneys' fees provided for were intended for services rendered in the proper and beneficial execution of the trust.

This case arose before there was any statute of this state relating to assignments of this character, and must therefore be determined without reference to our present

statute upon the subject. In the absence of any statutory legislation forbidding it, an assignor has the right to make such provision for the payment of attorneys' fees for the necessary and proper execution of the trust, and may appoint an attorney, even his own attorney, the assignee; and the presumption as to the conduct of the assignee, and of attorneys in the premises, should be in favor of fairness. Burrill on Assignments, sec. 417, and cases cited.

In view of all of the circumstances of the case, not the least of which is that the assignee took immediate possession of the property upon the assignment thereof, and from that time to the date of the attachment seizure had been engaged in the discharge of his duties, which are not pretended to have been exercised otherwise than in good faith, honesty and advantage, in the execution of the trust, we think the court below erred in taking from the jury the question of fraud in the assignment. Where fraud is apparent on the face of the instrument it is generally considered a question of law for the court, but comparatively few instruments bear this impress. Unless the terms of the assignment can be said to necessarily result in fraud, the question of fraud becomes one of intent. It is objected here that a preference is given to the attorneys named, and also that the terms are calculated to hinder and delay creditors. True, the law does not favor preferences, but it tolerates them, and in the absence of interdicting statutes, a debtor has the right to make preferences in respect to his creditors; and a necessary consequence of all assignments is to hinder and delay creditors to a certain extent. The hindering and delaying which is meant by the law as vitiating an assignment is that which is intended to be produced by the assignor in making the assignment, through motives of covin and malice or for his own benefit and advantage. Our statute declares that conveyances and assignments "made with the intent to hinder, delay or defraud cred-

itors * * * shall be void," as against the persons so hindered, delayed or defrauded (Gen. Stats. sec. 1526); while by section 1529 it is enacted that "the question of fraudulent intent, in all cases arising under the provisions of this title, shall be deemed a question of fact, and not of law."

Fraud is sometimes deemed a question of law, sometimes one of fact, and often a mixed question of law and fact. In New York, where there is a statute which, like ours, provides that fraudulent intent shall be deemed a question of fact, and not of law, there have been conflicting opinions upon the distinctions between fraud in fact and fraud in law. In the earlier cases in the supreme court the inclination was to bring the question within the province of the court by declaring it to be, in most instances, a question of law. In *Sturtevant v. Ballard*, 9 Johns. 342, it was said by Chief Justice Kent that fraud is a question of law, and especially where there is no dispute about the facts. It is the judgment of the law on facts and intents. The same opinion was expressed in *Jackson v. Mather*, 7 Cow. 301; but subsequently in the court of errors, in *Seward v. Jackson*, 8 id. 406, a different view was held. "Strictly speaking," it was said, "there is no such thing as fraud in law; fraud or no fraud is, and ever must be, a question of fact; the evidence of it may be so strong as to be conclusive, but it is still evidence, and as such must be submitted to a jury." And in *Jackson v. Timmerman*, 7 Wend. 436, Mr. Justice Sutherland uses this emphatic language: "There is no such thing as fraud in law as distinguished from fraud in fact. What was formerly considered as fraud in law, or conclusive evidence of fraud, and to be so pronounced by the court, is now but *prima facie* evidence, to be submitted to and passed upon by the jury."

A different exposition was afterwards given in construing the statute, which made a fraudulent intent a

question of fact, and a distinction was drawn between fraud and fraudulent intent. It was held by the chancellor that "the Revised Statutes have not made the fraud itself a question of fact; neither, indeed, was it possible for the legislature to do so; for when a party has intentionally executed an assignment or conveyance of his property, which must hinder and defraud his creditors of their just demands, the question whether the conveyance is fraudulent or not necessarily becomes a question of law and not of fact. The object of the statute was to reach a particular class of cases, where the conveyance would not necessarily have the effect to defraud creditors or others of their rights, and where the question of fraud must, of course, depend upon the intent with which the conveyance was executed. In all such cases the question of fraudulent intent is declared to be a question of fact and not of law." *Cunningham v. Freeborn*, 3 Paige, 557; also same case in 11 Wend. 240.

We regard the foregoing as a reasonable and correct interpretation of the object and meaning of this statute; but such view is not regarded as depriving the court of the power to pronounce the judgment of the law in any case, upon the facts disclosed, whenever a duty so to do becomes apparent to such court. In the case of *Dunham v. Waterman*, 17 N. Y. 9, Mr. Justice Selden, in commenting upon the case last above cited, says: "It follows from the reasoning of Mr. Justice Nelson, which I regard as unanswerable, that whenever an assignment contains provisions which are calculated *per se* to hinder, delay or defraud creditors, although the fraud must be passed upon as a question of fact, it nevertheless becomes the duty of the court to set aside the finding if in opposition to the plain inference to be drawn from the face of the instrument. A party must, in all cases, be held to have intended that which is the necessary consequence of his acts."

The supreme court of Minnesota, in referring to the New York cases, conclude as follows: "We gather as a result of the investigations of the New York courts that the question of fraudulent intent is a mixed question of law and fact; that is, that the existence of a certain intent is a question of fact for the jury (when not disclosed by the papers themselves), and for the court to declare whether such intent be fraudulent or otherwise." *Gene v. Murray*, 6 Minn. 305. See, also, *Baldwin v. Peet*, 22 Tex. 708.

For a full discussion of this subject and review of the authorities, see Burrill on Assignments, ch. 25.

We conclude, therefore, that looking to the deed of assignment itself in this case, we cannot say that its terms and provisions necessarily involve fraud, or disclose such an obvious intent to fraudulently hinder and delay creditors as to warrant a court in pronouncing it fraudulent and void upon its face. Those provisions objected to by defendants in error, and for which it appears the court rejected the instrument as void and inadmissible in evidence, are at most but badges of fraud, susceptible of explanation, like all *indicia*, and may or may not be evidence of a fraudulent intent. We think the deed should have been admitted in evidence, and, together with the testimony heard in this case, have been submitted to the jury.

For the error of the court in the respect above indicated the judgment must be reversed, and the cause remanded for a new trial.

Reversed.

DENVER FIRE INSURANCE COMPANY V. MCCLELLAND.

1. In an action against a corporation the plea of *ultra vires* is not to be understood as an absolute and peremptory defense in all cases of excess of power without regard to other circumstances and considerations. The plea is not to be entertained when its allowance will do great wrong to innocent third persons.

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2. If a private corporation has accepted and retained the full benefit of a contract which it had no power to make, the same having been fully performed by the other party thereto, and if the transaction is of such a nature that the party thus performing will suffer manifest hardship and injustice, unless permitted to maintain his action directly upon the contract, no other adequate relief being at his command, the defense of *ultra vires* may be disallowed.

BECK, C. J., and HELM, J., concurring specially.

Appeal from District Court of Larimer County.

THE facts are stated in the opinion.

MESSRS. STALLCUP, LUTHE and SHAFFROTH and TELLER and ORAHOOD, for appellant.

MESSRS. NORVILLE and CLARK and T. M. ROBINSON, for appellee.

STONE, J. The sole question in this case is whether the appellant can avail itself of the *ultra vires* of the contract upon which its liability, if any, arises as a defense to the action. The complaint of appellee, the plaintiff below, is as follows:

Plaintiff states that the defendant is a corporation duly organized and incorporated under the laws of the state of Colorado, and doing business in Larimer county in the state of Colorado as a general fire and hail insurance company.

"Plaintiff, for cause of action, states: 1. That on or about the 12th day of June, 1882, plaintiff was the owner of certain growing crops, situate on the east half of the northeast quarter and the north half of the southeast half of section 2, township 6, range 69 west, and southwest quarter section 35, township 7, range 69 west, in Larimer county, state of Colorado.

"2. That on said 12th day of June, 1882, the defendant in its said capacity of an insurance company contracted and agreed with plaintiff for and in consideration of the sum of \$61.03, \$3 of which said sum was then and there paid by plaintiff to defendant, and the balance of which

said sum, amounting to \$58.03, was then and there evidenced by a promissory note made due and payable on the 1st day of November, 1882, executed and delivered by plaintiff to defendant, and by defendant accepted, to insure the plaintiff in the sum of \$1,935 against loss or damage to the aforesaid growing crop by reason of injury to or destruction thereof by hail, and did then and there by its certain policy of insurance dated on the said 12th day of June, 1882, duly signed by Archie C. Fisk, its president, and R. P. Goddard, its secretary, and countersigned by Jesse Harris, its duly authorized agent, and by defendant delivered to plaintiff, insure plaintiff for the term of one year from the date of said policy against loss or damage to his said growing crops by reason of the destruction thereof or any injury thereto that might be caused by hail, and did by the terms and stipulations contained in said policy, and for and in consideration of the said sum of \$61.03, promise and agree to make good unto the plaintiff all such immediate loss or damage as might occur by reason of hail to the aforesaid growing crops from the said 12th day of June, 1882, to the 12th day of June, 1883, in the sum of \$1,935, to be paid sixty days after due notice and proof of such loss or damage.

“3. That said insurance covered and applied to plaintiff's said growing crops as follows, to wit: On sixty-five acres of wheat not to exceed, in case of loss, \$15 per acre, or \$975. On six acres of oats not to exceed, in case of loss, \$15 per acre, or \$90. On one hundred and twenty acres of wheat, not to exceed, in case of loss, \$6 per acre, or \$720. On one acre of strawberries, not to exceed, in case of loss, \$150 per acre.

“4. That by the terms and conditions of said policy of insurance, the defendant contracted and agreed that in the event of injury, loss or damage to plaintiff's said growing crops or any part thereof, not amounting to a total destruction thereof, such damage or injury should be appraised by disinterested and competent persons to be

mutually agreed upon by plaintiff and defendant, unless the amount of such damages should be agreed upon between the plaintiff and defendant.

"5. That on the 19th day of June, 1882, plaintiff's said growing crops were injured and damaged by hail to the amount of \$1,500, and the plaintiff sustained damage and loss thereby in respect of his said growing crops in the said sum of \$1,500.

"6. That on the 19th day of June, 1882, plaintiff gave defendant due notice of plaintiff's said loss and damage.

"7. That on the 22d day of June, 1882, plaintiff rendered to defendant a particular account of said loss and damage verified by the affidavit of plaintiff.

"8. That said crops not being totally destroyed by said hail, and the plaintiff and defendant not being able to agree upon the amount of said damages so sustained by plaintiff, the plaintiff and defendant mutually agreed upon W. F. Watrous and Charles Warren, two disinterested and competent persons, as appraisers to assess and appraise the amount of damages and loss so sustained by plaintiff.

"9. That the said W. F. Watrous and Charles Warren did then and there, on the 22d day of June, 1882, appraise the damage and injury to plaintiff's said crops caused by the injury thereto by hail as aforesaid at the sum of \$1,500 as follows, to wit:

"To plaintiffs said sixty-five acres of wheat hereinbefore mentioned as insured for \$975, said appraisers assessed and appraised the damages at the sum of \$780. To plaintiff's said six acres of oats hereinbefore mentioned as insured at and for \$90, said appraisers assessed and appraised the damages at \$90. To plaintiff's said one hundred and twenty acres of wheat hereinbefore mentioned as insured for \$720, said appraisers assessed and appraised the damages at \$480; and to plaintiff's said one acre of strawberries hereinbefore mentioned as insured for \$150, said appraisers assessed and appraised the

damages at \$150; which said appraisement represented the true damage and injury done to plaintiff's said growing crops by said hail.'

"10. That said appraisers, on the 22d day of June, 1882, made out and delivered to defendant a statement or report in writing, verified by their affidavits, setting out in detail their said appraisement of the damages aforesaid as herein averred and set forth.

"11. That more than sixty days have elapsed since the aforesaid notice and proof of plaintiff's loss and damage were received by defendant at its office, and that defendant has wholly failed, neglected and refused to pay plaintiff the said sum of \$1,500, or any part thereof, and has failed and refused to make good or pay plaintiff for his said loss and damage, or any part thereof.

"Wherefore plaintiff prays judgment for \$1,500, together with interest and costs of suit, and for general relief."

The amended answer of the appellant company, the defendant below, "denies that on the 19th day of June, 1882, or at any other time, plaintiff's growing crops were injured or damaged by hail to the amount of \$1,500, or any other amount, or that plaintiff sustained damage or loss thereby in respect of his growing crops in the said sum of \$1,500, or any other sum.

"Denies that the plaintiff and defendant mutually agreed upon W. F. Watrous and Charles Warren, or either of them, or any other person or persons, as appraisers to assess or appraise the amount of damage or loss so pretended to be sustained by plaintiff, or that said pretended appraisers acted by any authority whatever, but avers that all and each part of said pretended appraisement, and each and every act of said pretended appraisers in the behalf mentioned in said complaint, were without authority, irregular, illegal and void.

"Defendant for a second and separate defense to the complaint herein states that it is a corporation duly in-

corporated under and by virtue of the laws of the state of Colorado, and doing business in said county of Larimer; * * * that said articles of incorporation have never been amended; that said articles of incorporation were duly filed and recorded in the office of the secretary of state of Colorado on the 26th day of August, A. D. 1881, and were duly filed and recorded in the office of the county clerk and recorder in and for said Larimer county long before the 12th day of June, A. D. 1882, and long before the alleged contract between plaintiff and defendant was made.

“Defendant further states that, by virtue of said articles of incorporation, neither the said The Denver Fire Insurance Company, its directors, stockholders or officers, had or have any right, power or authority to enter into or make any contracts with plaintiff or any one by which said company could insure growing crops of any kind against loss or damage by hail, but that all and each of the several acts of the said The Denver Fire Insurance Company, its directors, stockholders and officers, which are alleged and set forth in the complaint herein in reference to the making of said alleged contract with plaintiff, and to the insurance and making of the alleged policy of insurance to plaintiff, and all other acts with reference to the terms of the said policy, the alleged agreement to arbitrate any loss of plaintiff, and the alleged appointment and finding and appraisalment of said alleged arbitrators, are absolutely null and void, each and every act being beyond the scope and power vested by the said articles of incorporation in defendant, its directors, stockholders and officers.

“Defendant further states that it is willing to return all that it has received from plaintiff by reason of said alleged policy of insurance, to wit, \$3, and plaintiff's said promissory note for \$58.03. Wherefore defendant asks to be discharged with costs.”

The articles of incorporation are set out in full in the

foregoing answer, that portion which is material to the question before us being as follows:

“Know all men by these presents, that we, Archie C. Fisk, Samuel S. Griswold and Frederick Michel, residents of the state of Colorado, have associated ourselves together under the name and style of The Denver Fire Insurance Company, for the purpose of becoming a body corporate and politic, under and by virtue of the laws of the state of Colorado, and in accordance with the laws of the said state. We hereby make, and execute, and acknowledge three hundred original certificates, in writing, of our intention to become a body corporate under and by virtue of said laws.

“1. The corporate name and style shall be The Denver Fire Insurance Company.

“2. The objects for which this company is formed are to become a body corporate and politic, with power to sue and be sued, to insure buildings of all kinds erected or in process of erection, goods, wares and merchandise, machinery, mills, factories, smelters, foundries, machine shops, breweries and personal property of every description, whether in store, transit or use, from loss or damage by fire, and generally do and transact all business necessary to effectually secure indemnity from loss or casualty by fire or lightning, and all other business transacted by fire insurance companies. To borrow and loan money, take mortgages, trust deeds or other securities, and to pledge the property and franchise of the company, both real and personal, to acquire by purchase, leases, entry, grant, devise, or gift or otherwise, real estate or other property, and to dispose of said property at pleasure, and to perform any and all lawful acts which the directors or stockholders may deem necessary for the successful prosecution of the business of the company.”

Appellee demurred to this second defense. The demurrer was sustained, and the appellant electing to stand by the answer, the damages were assessed by a jury, who

returned a verdict for \$1,265.50, and judgment therefor was thereupon rendered by the court. The errors assigned go to the sustaining of the said demurrer and the judgment rendered.

The authorities cited on both sides of the case are very numerous. Questions touching the *ultra vires* of corporations have been before the courts of probably every state in some shape, and various phases of the question have been many times considered by the federal courts, while standard text-books are full of research and discussion upon the entire subject. We have examined these authorities with care, but a review of them here would be unnecessary labor, since both the English and American authorities have been collated and discussed fully in many of the leading cases cited by counsel in their briefs filed in the case. In respect to the precise question before us, there is apparently much conflict of opinion in the decisions of the courts, such conflict being in many cases apparent only, but in others squarely antagonistic. It is quite well settled as a general rule that a corporation possesses only such lawful powers as are expressly conferred by its charter, and such as are clearly incidental or impliedly requisite for carrying out the declared objects and purposes of its creation.

On the one hand, it is held by some authorities that acts of a corporation in excess of the powers limited by the foregoing rule are illegal, that any contract made in such excess of lawful authority is void and not enforceable, and that neither party to an action founded thereon is estopped to plead the *ultra vires* of the contract in bar of such action.

On the other hand, it has come to be the settled doctrine of several states that a corporation may be estopped to deny its authority to enter into a contract which has been executed, and from which it has derived the benefit which it thereby sought. There seems to be a growing tendency

to this doctrine in modern decisions in this country and it is also supported by the authority of English cases.

As is said in *Parish v. Wheeler*, 22 N. Y. 494, a leading case upon this subject in the United States: "The executed dealings of corporations must be allowed to stand for and against both parties where the plainest rules of good faith require."

Mr. Waterman, in his late excellent treatise upon the specific performance of contracts, says that it is now settled that a corporation cannot avail itself of the defense of *ultra vires*, when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract. Sec. 226. So if the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation.

In the case before us the contract, as made by the parties, appears to have been fully executed on the part of the appellee, so far as his right of action when brought was affected by it. He had paid a small portion of money on the amount of the premium agreed to be paid and had given a promissory note for the balance. This was all he had agreed to do; all that had been exacted of him by the insurance company, and this he had performed. It matters not that the note had not been paid, for it was not due when his right of action accrued and when he brought his suit.

It is not contended that the payment of the note was a condition precedent to his right of action against the company, since, at the time of bringing the action, the note lacked two months of maturity, and there was nothing to be done or performed by him under the contract. The performance already made by the appellee had been accepted by the appellant company, and, so far as it was

concerned, the execution of the note was the same as a cash payment in full of the amount; the company had the benefit thereof. It is argued on behalf of the appellant that the courts ought in all such cases to sustain the defense of *ultra vires*, here interposed, on the ground of public policy; that the public which confers the corporate powers upon such companies has an interest in the protection of innocent stockholders and creditors of such companies by confining the exercise of corporate powers strictly within their authorized limits, and this is given in the books as the chief reason for the rule of decision in the cases which sustain the defense of *ultra vires*.

That the public has such an interest is quite true, but whether to afford such protection the defense of *ultra vires* is always necessary in such cases is another thing. Stockholders are but one portion of the public; another portion, with equal rights of protection, is that with whom these multiform corporations deal in the daily exercise of their assumed powers. And it seems illogical to assume that the interests of the public would be best subserved by a public policy which will allow a corporation, any more than an individual, to violate the principles of common honesty and claim exemption from the obligation of its contracts by pleading its own wrong-doing. Such policy would rather seem to offer a premium for dishonest dealing.

Besides, both the state which grants these corporate powers, and the stockholders for whose benefit such powers are exercised, have their remedies, the former by interfering to revoke the charter, and the latter by an action to restrain the unauthorized undertakings. While courts are inclined to maintain with vigor the limitations of corporate actions, whenever it is a question of restraining the corporation in advance from passing beyond the boundaries of their charters, they are equally inclined, on the other hand, to enforce against them contracts, though *ultra vires*, of which they have received the benefit. If

the other party proceeds to the performance of the contract, expending his money and labor in the production of values, which the corporation appropriates, such corporation will not be excused on the plea that the contract was beyond its powers. *Bradley v. Ballard*, 55 Ill. 413.

Corporations have the capacity to do wrong, and may overstep the limits placed by the law to their powers, and when they violate their charters in this respect their acts are illegal, but not necessarily void. *Bissell v. Mich. etc. R. R. Co.* 22 N. Y. 258.

The plea of *ultra vires* is not to be understood as an absolute and peremptory defense in all cases of excess of power without regard to other circumstances and considerations. The plea is not to be entertained where its allowance will do great wrong to innocent third persons. *Bissell v. Mich. etc. R. R. Co.* 22 N. Y. 258. Where a certain act is prohibited by statute, its performance is to be held void because such is the legislative will. So where the consideration of a contract is by law illegal, as where the cause of action arises *ex turpe*. But where the act is not wrong *per se*, where the contract is for a lawful purpose in itself, has been entered into with good faith, and fairly executed by the party who seeks to enforce it, we must assent to the doctrine of those authorities which hold that the excess of the corporate powers of the contracting party which has received the benefit of the contract is an unconscionable defense, which may not be set up to exempt from liability the party so pleading it. And such, we think, is the case before us.

The answer of the insurance company does not deny the averment in the complaint that the company "was doing business in Larimer county, in the state of Colorado, as a general fire and hail insurance company." It does not deny that it entered into the contract of insurance with the appellee in manner and form as alleged in said complaint, nor that the contract was executed as averred. The sole defense upon which the appellant

company relies here is its want of authority to insure against hail. By offering to insure the property of appellee against damage by hail, and by entering into the contract of insurance therefor, it claimed to possess the power so to do. It took the appellee's money and assumed the risk and obligation of paying the damage, much or little, that might occur, or of having nothing at all to pay, if the contingency of damage should not happen within the time covered by the policy.

A loss having occurred, the company seeks exemption from the obligation it entered into by denying that it had any authority to do what it asserted the right to do when it voluntarily assumed the undertaking.

We are aware that the courts have been very slow to concede that a defendant setting up as a defense the *ultra vires* of a contract, where said contract was clearly not authorized, should be held liable on the contract, since this would appear to sustain the enforcement of an unauthorized contract, and therefore the cases show that whenever the courts could avoid this seeming inconsistency by resting the recovery upon some other ground they have done so. This has often led to equal inconsistency in other directions. The true ground would seem to be that of equitable estoppel, whereby the defendant is not permitted to rely upon or show the invalidity of the contract. In such case, the contract is assumed by the court to be valid, the party seeking to avoid it not being permitted to attack its character in this respect.

The point was strongly insisted upon by counsel for appellant in argument, that one dealing with a corporation is bound to know the extent of its powers to contract, that the corporate name itself indicates the scope of its business, and the record of its charter or articles of incorporation furnishes notice of the extent and limitation of its corporate powers and authority to contract.

While as a general proposition this is true, yet it must be conceded that this constructive notice is of a very

vague and shadowy character. Every one may have access to the statutes of the states affecting companies incorporated thereunder, and to their articles of incorporation, but to impute a knowledge of the probable construction the courts would put upon these statutes and articles of incorporation to determine questions raised upon a given contract proposed, is carrying the doctrine of notice to an extent which can only be denominated preposterous. It was in answer to the same point that Chief Justice Comstock observed, in his opinion in a leading case upon this question, that "a traveler from New York to Mississippi can hardly be required to furnish himself with the charters of all the railroads on his route, or to study a treatise on the law of corporations." *Bissell v. M. S. & N. J. R. R. Co.* 22 N. Y. 258. It was urged in argument on behalf of appellant that the state, which created these corporations for public good, has such an interest in their existence and perpetuity that public policy should be interposed to keep them within the legitimate exercise of their powers. This may be true to a certain extent, and the state may interpose to revoke their charters for an abuse thereof; but we take it that it is no more the public policy of the state to protect the business of private corporations than that of its individual citizens; and to invoke public policy in a case like the one at bar, in order to prevent a corporation from doing wrong, by punishing the other party, would differ little from asking a court, on the ground of public policy, to prevent the obtaining money or goods through false pretenses by holding that the party defrauded should be punished by the loss of his money or goods.

While such wrong may be prevented by interference on the part of the state, or stockholders of the company, it cannot well be said that to cure the evil it is necessary in every case to exempt the company from the liability of its unauthorized engagements.

The principle of estoppel by conduct is the same prin-

ciple which is applied by courts in holding that the statute of frauds, by which, under the general rule, a contract would be void, is never to be used for the protection of a fraud.

The essential elements of an estoppel by conduct are laid down by this court, in *Griffith v. Wright*, 6 Colo. 248, to be that: 1. There must have been a representation or concealment of material facts. 2. The representations must have been made with knowledge of the facts, unless the party representing was bound to know them, or that ignorance thereof was the result of gross negligence. 3. The party to whom it was made must have been ignorant of the truth of the matter. 4. It must have been made with the intention that the other party should act upon it; but gross and culpable negligence on the part of the party sought to be estopped, the effect of which is to make a fraud on the party setting up the estoppel, supplies the place of intent. 5. The other party must have been induced to act upon it. The case before us seems to be fairly brought within the foregoing rules and definitions. The insurance company, through its agent, not only concealed the want of authority to insure against hail, which it now sets up, but its open notorious acts in soliciting policies of this character throughout the country impliedly held out and represented its authority for such business.

Such agent was certainly bound to know the extent of the authority of the company he represented, and if his acts in the premises were not done with full knowledge of the facts, his ignorance in this respect was gross and culpable negligence.

That the appellee was ignorant of the truth of the matter of want of authority in the company is not denied by the appellant company, except by an inference which, it is argued, is to be drawn that the articles of incorporation and the record thereof furnished constructive notice of the extent of authority of said company. But it seems

to us that such an inference is rebutted by the presumption fairly arising from the nature of the transaction, that the appellee would not have paid his money for the performance of a promise which he knew was void; that its performance could not be enforced, and that his money would be utterly thrown away.

That the offer of the appellant to insure, and the representations made to induce the appellee to enter into the contract of insurance, were made with the intent that the appellee should act thereon, is self-evident from the nature of the transaction, and the acceptance by the appellee of the offer so made by the appellant; and that the appellee was induced to act upon the offer and representations so made is equally apparent, for the act was an obvious sequence of the inducement.

It was strenuously contended by counsel for appellant in the oral argument of this case that whether the contract in a case of this kind is executed or not is immaterial; that the true grounds of liability depend upon, and should be placed upon, the fact of whether the elements of estoppel exist; whether the conduct of one party has been such as that the other party would be defrauded or injured thereby unless the contract should be enforced.

However this may be in respect to the other cases, or as a general rule, we are quite willing to assent to this view in the particular case before us, and to rest our decision upon the ground of estoppel by the conduct of the appellant company.

We do not say that the directors or acting officers of such company may act in excess of their legitimate powers against the interests and contrary to the will of the stockholders of such company, but while admitting the excess of proper authority, we think, on principle and the weight of modern decisions, that if the stockholders, whose business it is to see that their own managing officers act within the proper scope of their powers,

either expressly, or by silence impliedly, assent to acts done on their behalf in excess of authority, they should be held estopped to deny that such acts were authorized.

The appellant company here offered to pay back the money and return or cancel the note given for the policy, and counsel urgently contended that this is all that legally can or rightfully ought to be exacted. This would not place the appellee *in statu quo*. Every insurance company would be ready and willing to do that much after the loss had occurred, on condition of exemption from payment of the loss. The damage to appellee is the loss of his crops against which the appellant undertook to secure him. After the loss it was too late for appellee to insure in another company having unquestioned authority to insure against such loss.

We therefore conclude that since the contract of insurance, though it may have been beyond the scope of the proper object and purposes of the company as expressed and conferred by their articles of incorporation, was neither by statute nor by their charter expressly forbidden, nor in its nature illegal or improper, and since the conduct of the company in soliciting the insurance and entering into the contract therefor under the circumstances disclosed by this case was such that to exempt it from its engagements thereunder would result in injuring and defrauding the appellee, who in good faith dealt with the company under the belief of its rightful authority in the premises, the defense of the appellant company interposed against its liability on the contract is inequitable, unconscionable, and should not be allowed.

It is admitted that a contract is not enforceable when prohibited by statute; when not so prohibited, however, and when not illegal or immoral in its nature, nor contrary to sound public policy, a contract, even *ultra vires*, may be enforced, when, under the circumstances of its execution, every consideration of justice requires it. This

is the ground of decision in most of the cases relied upon by the appellee in the case.

As is said by the supreme court of the United States in the case of *Zabriskie v. Cl., Col. & Cin. R. R. Co. et al.* 23 How. 400: "A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claim their own conduct has superinduced."

Among the many authorities examined in support of our views in this case, we cite the following: *Parish v. Wheeler*, 22 N. Y. 503; *Bissell v. M. S. etc. R. R. Co.* id. 258; *Bradley v. Ballard*, 55 Ill. 413; *Whitney Arms Co. v. Barlow*, 63 N. Y. 69; *Darst v. Gale*, 83 Ill. 141; *State B'd of Agr. v. Citizens' Street R'y Co.* 47 Ind. 407; *Oil Cr. etc. R. R. Co. v. Pa. Trans. Co.* 83 Pa. St. 166; *Argenti v. City of San Francisco*, 16 Cal. 255; *State of Ind. v. Woram*, 6 Hill, 37; *Converse v. Norwich & N. Y. Trans. Co.* 33 Conn. 180, modifying the doctrine in the case of *Hood v. N. Y. & N. H. R. R. Co.* 22 Conn. 502; *Chicago Build. Soc. v. Crowell*, 65 Ill. 453; *Ward v. Johnson et al.* 95 Ill. 215-240; *Zabriskie v. Cl., Col. & Cin. R. R. Co. et al.* 23 How. 398-401; *Hitchcock v. Galveston*, 96 U. S. 341-351; *Nat. Bank v. Matthews*, 98 id. 621; *Manville v. Belden M. Co.* (McCrary, J. U. S. Cir. Ct.) 3 Col. Law, 558; Green's Brice's *Ultra Vires*, 371, and cases cited; Sedgwick's *Stat. and Const. L.* 90; Waterman's *Specific Perf. Cont.*, cited *supra*.

The judgment of the court below is affirmed.

Affirmed.

BECK, C. J., and HELM, J., concurring. Private corporations are creatures of statute, and derive their powers solely therefrom. Upon weighty considerations of public policy, and of private equity as well, the principle has been universally recognized that the charters or general

laws through which these corporations derive their existence absolutely control their action; that a contract made or an act done by them which is not in any manner authorized by some express provision of the charter or law of incorporation, or which may not be clearly implied therefrom, is *ultra vires*; and that such usurpation of power may be relied upon as a complete defense to a suit growing out of the unauthorized act or contract.

But, for the purpose of avoiding the infliction of manifest injustice in given cases, many courts of the highest respectability have seen fit to recognize an exception to the foregoing doctrine. This exception, when admitted, is always based upon principles largely analogous to those supporting equitable estoppels. The decisions recognizing it hold that where a corporation receives and retains the full benefit of a contract, and a failure to perform on its side would result in palpable injustice to the other contracting party, it is estopped from escaping liability thereunder through a plea of *ultra vires*.

We are inclined to the opinion that cases sometimes arise wherein this exception, properly understood and limited, should be held applicable. If a private corporation has accepted and retained the full benefits of a contract which it had no power to make, the same having been performed by the other party thereto; and if the transaction is of such a nature that the party thus performing will suffer manifest injustice and hardship unless permitted to maintain his action directly upon the contract, no other adequate relief being at his command, we think the defense of *ultra vires* may be disallowed. This, however, does not do away with the objectionable character of the unauthorized contract. It admits the legal wrong committed by the usurpation of power, but denies the equitable right of the corporation to profit through such wrong at the expense of parties contracting with it; the corporation, having received and retained the benefit of the contract, is denied the privilege of invoking

the illegality of its act, and thus avoiding consequences naturally flowing therefrom.

The circumstances attending and surrounding the transaction now before us, in our judgment, render this an appropriate case for the application of the foregoing equitable doctrine. For this reason we concur in the conclusion arrived at by Mr. Justice Stone, who writes the principal opinion.

Affirmed.

RANDOLPH ET AL., ADMINISTRATOR, ETC., V. HELPS ET AL.

1. This court cannot proceed upon conjecture, and by implication add a provision to a lease which defeats the leasehold estate granted by express terms.
2. It is a familiar rule that extrinsic evidence is not admissible, either to contradict, add to, subtract from, or vary the terms of a written instrument. The rule applies with greater force to all instruments required, by the statute of frauds, to be in writing.
3. As to a writing not within the statute of frauds, where the effect of a defeasance is claimed for a provision in an instrument, the same rule applies.
4. Where the words of a contract are free from ambiguity in themselves, and no doubt or difficulty arises as to their meaning or application, they are to be construed and applied in their plain and general acceptance.
5. All oral negotiations or stipulations between the parties which preceded or accompanied the execution of the instrument are to be regarded as merged in it, and the latter is to be treated as the exclusive medium of ascertaining the agreement to which the contractors bound themselves. Parol evidence is admissible to explain and apply the writing, but not to add to it or vary its terms.

Error to District Court of Boulder County.

THE complaint alleges that on October 6, 1881, William Stimson was the owner in fee of southwest quarter section 21, township 1 south, range 70 west, in the county of Boulder, Colorado; that on said day he leased the same to the defendants for the purpose of mining for coal, and

9	20
12	70
9	29
9a	180
9	29
32	83
9	29
137	211

defendants took possession of the same; that by the terms of the lease it was provided that if said Stimson should sell the leased premises during the term of the lease, the said Stimson should pay to the defendants the value of all improvements placed upon said premises, and that the defendants should deliver up said premises to said Stimson or his vendee, and that the term of the lease should then terminate; that said Stimson sold the premises leased June 7, 1882, to the plaintiff; that he immediately gave notice thereof to the defendants, and offered to make the appraisalment called for by the terms of the lease, and to pay to defendants the value of the improvements made by them; that the defendants refused to receive the value of their improvements and refused to surrender up the possession of the premises, either to Stimson or to the plaintiff, his grantee; that the value of his improvements is \$200; that the said Stimson and the plaintiff are willing and offer to pay for the same; that both Stimson and the plaintiff have demanded in writing, of the defendants, the possession of the said premises, but defendants refuse to deliver possession of the same, and unlawfully hold over, contrary to the statute; that the use and occupation of the said premises is of the monthly value of \$100; that plaintiff is damaged by the detention \$100 per month. Plaintiff prays for judgment for the restitution of the premises, for \$2,000 for use and occupation thereof, for damages, and for costs of suit. The answer admits the ownership of Stimson, and the leasing of the premises as alleged in the complaint; admits that defendants took possession of the same, and alleges that the lease was in writing; denies that they ever entered into any lease with a provision for a forfeiture in case the lessor should sell the premises, or into any lease containing the stipulations as alleged by the plaintiff; that the term of existence of said lease was not contingent on the sale of the premises by the lessor, and that no sale authorized the plaintiff to obtain posses-

sion of the premises, and the lease was never so understood by the parties thereto. * * * Replication by the plaintiff. Trial to the court, and judgment of nonsuit.

Messrs. R. H. WHITELY, WRIGHT and GRIFFIN and R. D. THOMPSON, for plaintiffs in error.

Mr. G. BERKLEY, for defendants in error.

ELBERT, J. The complaint alleges "that by the terms of the lease it was provided that, if Stimson should sell the leased premises during the term of the lease, the said Stimson should pay to the defendants the value of all improvements placed upon the premises, and that the defendants should deliver up the premises to Stimson, or his vendee, and that the term of the lease should then terminate." The only provision of the lease pertaining to this issue is as follows:

"And it is further stipulated and agreed by the second party that if the first party should sell or dispose of his interest in said premises, said first party shall pay to said second party the appraised value of all the improvements of said second party on said premises, and, in the event of said appraisal, each of the two parties to this contract are to appoint a disinterested man; and if said two men cannot agree on the price of said improvements, said two men are to choose a third man, and a decision of a majority of said three men is to be the price of said improvements."

Construing this provision according to the settled rules applicable to the case,—collecting the intention from the context and words used,—it cannot be said that it was agreed between the contracting parties that the lease was to terminate upon the sale of the leased premises by the lessor. We find, by its terms, a plain and unambiguous provision for the appraisal of the improvements on the leased premises in case of sale, and for the pay-

ment of the appraised value by the lessor; but there is nothing in its terms to the effect that the lessees, in case of sale, shall deliver up the premises to Stimson or his vendee, or that the term of the lease shall terminate. If such was the intention of the contracting parties, they did not express it in their written contract; nor is there any attempt to express such an agreement. It is not the case of an imperfect expression of intention, but one of entire omission, if the intention existed. Payment for the improvements in case of sale may seem unusual, without surrender of the lease, but we cannot say that a surrender is necessarily implied from such a provision. Some very different consideration, known to the parties and unknown to us, may have influenced them. We cannot proceed upon conjecture, and by implication add a provision to the lease which defeats the leasehold estate granted by its express terms. On its face, it is an entire contract, and purports to express fully the intention of the parties.

On the trial below "the plaintiff offered to prove, in support of the lease, that the declared intention of the parties at the time, in using the language set forth in the lease, was that upon a sale of the property by Stimson the possession was to be delivered to Stimson, or his vendee." The language of the offer, taken in connection with the terms of the provision, leaves it in doubt whether the purpose was to explain the language used in the lease, or to show a contemporaneous parol understanding. It was not admissible for either purpose in this case. It is a familiar rule that extrinsic evidence is not admissible, either to contradict, add to, subtract from, or vary the terms of a written instrument. The rule applies with greater force to all agreements required by the statute of frauds to be in writing; but, as the effect of a defeasance is claimed for the provision, we apply the rule as to a writing not within the statute of frauds and say: (1) Where the words of the contract are free from ambiguity

in themselves, and no doubt or difficulty arises as to their meaning or application, they are to be construed and applied in their plain and general acceptance. Written instruments would be of but little value if evidence *dehors* were admissible to show an intention different from the plain intention expressed by unambiguous words. The language of a contract is the agreed repository of the intention of the parties, and from it, when free from ambiguity, they cannot be allowed to appeal to the less certain testimony of witnesses. 2 Phil. Ev. *634. (2) All oral negotiations or stipulations between the parties which preceded or accompanied the execution of the instrument are to be regarded as merged in it, and the latter is to be treated as the exclusive medium of ascertaining the agreement to which the contractors bound themselves. Parol evidence is admissible to explain and apply the writing, but not to add to it or vary its terms. 2 Phil. Ev. *666, *667. In a direct proceeding for that purpose, upon a proper and sufficient showing, a court of equity has the power to reform this instrument in case of fraud or mistake, but, until so reformed, it must stand as the agreement of the parties, and be interpreted by the plain language which they have used. The judgment of the court below is affirmed.

Affirmed.

STIMSON V. HELPS ET AL.

1. The law holds a contracting party liable as for a fraud on his express representations concerning facts material to the treaty, the truth of which he assumes to know, and the truth of which is not known to the other contracting party, where the representations were false, and the other party, relying upon them, has been misled to his injury.
2. Fraud is the term which the law applies to certain facts, and where upon the facts the law adjudges fraud, it is not essential that the complaint should in terms allege it. It is sufficient if the facts stated amount to a case of fraud.

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4a	20
9	33
23	306
9	33
136	57

Appeal from County Court of Boulder County.

THE complaint sets out that on the 6th day of October, 1881, William Stimson leased to the defendants in error the southwest quarter of section 21, in township 1, range 70 west, in said county, for the period of four years and six months, for the purpose of mining for coal, under the conditions of said lease; that they had no knowledge of the location of the boundary lines of said tract at the time of the leasing, and that they so informed Stimson, the defendant in the case; that they requested Stimson to go with them and show them the boundary lines; that the defendant, pretending to know the lines bounding said land, and their exact locality, went then and there with plaintiffs, and showed and pointed out to them what he said was the leased land, and the boundary lines thereof, especially the north and south lines thereof; that plaintiffs not then knowing the lines bounding said land, nor the exact location thereof, and relying upon what the defendant then and there pointed out to them as the leased land, and the lines thereof, then and there proceeded to work on the land pointed out, and sank shafts for mining coal thereon, and made sundry improvements thereon — made buildings, laid tracks, etc.; that all the said work was done and labor performed and improvements made on the land pointed out by defendant to plaintiffs as the leased land, and that plaintiffs, relying upon the statements of defendant as aforesaid, and not knowing otherwise, believed they were performing the work, and making all the improvements on the land they had so leased, which they did by direction of the defendant; that while they were working on the said land Stimson was frequently present, and told the plaintiffs they were on his land, and received royalty from ore taken therefrom; that about April 10, 1882, they were notified to quit mining on said ground by the Marshall Coal Mining Company; that the land belonged to said company;

that none of the said improvements were put on said leased land; and that they were compelled to quit work and mining thereon; that the improvements made by them were worth \$2,000; that Stimson falsely represented to them other and different lines than the true boundaries of said premises, and showed and pointed out to them other and different lands than the lands leased them, and thereby deceived them and damaged them in the sum of \$2,000. Issue joined and trial to the court. Motion by defendant's counsel, for judgment on the pleadings and evidence, overruled. Judgment for the plaintiffs in the sum of \$2,000 and costs.

MEASRS. WRIGHT and GRIFFIN, for appellant.

MR. G. BERKLEY, for appellees.

ELBERT, J. The law holds a contracting party liable as for a fraud on his express representations concerning facts material to the treaty, the truth of which he assumes to know, and the truth of which is not known to the other contracting party, where the representations were false, and the other party, relying upon them, has been misled to his injury. Upon such representations so made the contracting party to whom they are made has a right to rely, nor is there any duty of investigation cast upon him. In such a case the law holds a party bound to know the truth of his representations. Bigelow, *Fraud*, 57, 60, 63, 67, 68, 87; Kerr, *Fraud & M.* 54 *et seq.*; 3 Wait, *Act. & Def.* 436. This is the law of this case, and, on the evidence, warranted the judgment of the court below.

The objection was made below, and is renewed here, that the complaint does not state sufficient facts to constitute a cause of action. Two points are made: (1) That the complaint does not allege that the defendant knew the representations to be false; (2) that it does not allege intent to defraud.

It is not necessary, in order to constitute a fraud, that the party who makes a false representation should know it to be false. He who makes a representation as of his own knowledge, not knowing whether it be true or false, and it is in fact untrue, is guilty of fraud as much as if he knew it to be untrue. In such a case he acts to his *own knowledge* falsely, and the law imputes a fraudulent intent. Kerr, Fraud & M. 54 *et seq.*, and cases cited; Bigelow, Fraud, 63, 84, 453; 3 Wait, Act. & Def. 438 *et seq.*; 2 Estee, Pr. 394 *et seq.* "Fraud" is a term which the law applies to certain facts, and where, upon the facts, the law adjudges fraud, it is not essential that the complaint should, in terms, allege it. It is sufficient if the facts stated amount to a case of fraud. Kerr, Fraud & M. 366 *et seq.*, and cases cited; 2 Estee, Pl. 423. The complaint in this case states a substantial cause of action, and is fully supported by the evidence.

The action of the county court in refusing to allow the appellant to appeal to the district court after he had given notice of an appeal to this court, and time had been given in which to perfect it, cannot be assigned as error on this record. If it was an error, it was error not before, but after, the final judgment from which this appeal is taken.

The judgment of the court below is affirmed.

Affirmed.

ROCKWELL V. GRAHAM.

1. An action to determine an adverse claim to a placer claim, and to recover a designated portion thereof, is not sustained by proof of a mere easement in the plaintiff over the premises in controversy.
2. A right of way for a flume to conduct water is such an easement as is protected by the federal statutes, and is not ground for an adverse claim to the land.
3. Where parties stipulate in open court as to their respective sources of title, evidence in contradiction thereof is inadmissible.

4. Where land is described in several deeds in different terms, parol evidence to identify the premises as being one and the same is admissible.

Appeal from District Court of Clear Creek County.

THE defendant having made application for the government title to a certain placer claim, the plaintiff filed an adverse claim, and brought this action for a portion of the premises, to wit, "for one mill-site, two hundred and fifty feet square, * * * and the *land* for a mill-race from said mill-dam * * * to said mill-site." Trial by jury, and instruction by the court to find for the defendant. Verdict and judgment for defendant.

Mr. L. C. ROCKWELL, for appellant.

Mr. HUGH BUTLER, for appellee.

ELBERT, J. The court did not err in instructing the jury to find for the defendant. The evidence does not show title in the plaintiff to either the mill-site or the *land* for the mill-race. The evidence does show title in the plaintiff to a "right of way for a flume to conduct water along the creek to what is known as the 'Railey Mill.'" This is the language of the reservation made in Railey's deed by Dean, his attorney in fact, to Montague, the grantor of the defendant, and (within the boundaries of the premises in dispute) this is all that passed by Robert Railey's subsequent deed to Becker, the grantor of the plaintiff.

This is an easement. It is not what is declared on; evidence of it does not support the issue; nor is such a right ground for an adverse claim, being fully protected by the provisions of the federal laws. Rev. Stat. §§ 2339, 2340.

The refusal of the court to allow proof of a pre-emption by Becker is assigned as error. On the trial of the cause, "it was stipulated and agreed in open court, by the re-

spective parties, that the plaintiff and defendant claim title from Tarleton Railey and Mary Railey, and that they were the common grantors to plaintiff and defendant. The nature of Becker's pre-emption, the law under which, and the purpose for which, it was made, does not appear. Presumably the offer was made for the purpose of showing *title* by pre-emption. If so, it was not admissible as being in contravention of the stipulation above stated.

As to the third assignment, it is sufficient to say that the description of the premises contained in a deed from Dougherty to Montague is referred to by Dougherty in his testimony, apparently for the purpose of *identifying* the premises conveyed by Dean, attorney in fact, with the premises conveyed to Montague, and by Montague to the defendant; the premises having been described in the two last-named deeds in different terms. Possibly the deed itself was introduced in evidence for the same purpose, but this does not clearly appear. We do not see in this any ground for reversal.

These are all the assignments of error it is necessary to notice. The judgment of the court below is affirmed.

Affirmed.

HIGGINS ET AL. V. ARMSTRONG.

9	38
11	183
9	38
12	404
9	38
16	88
16	527
9	38
18	17
2a	266
9	38
32	49
9	38
25	119
9	38
17a	58

1. The principal is bound by all acts of the agent within the scope of the authority, as held out to the world by the principal, although more limited private instructions have been given which are unknown to persons dealing with him.
2. That an agency may be proved by the habit and course of dealing between the parties is clear upon principle and authority.
3. A mining partnership exists where the several owners of a mine co-operate in the working of the mine. Such partnership is governed by many of the rules relating to ordinary partnerships, but differing therefrom in many important particulars.
4. Where a member of a mining partnership purchases articles necessary to the carrying on of the business, the debt being contracted in the usual course of business, and within the scope of the part-

- nership venture, the individual member having authority to contract the debt, the copartners will be bound thereby.
5. Notice of facts to an agent is constructive notice to the principal himself when it arises from, or is at the time connected with, the subject-matter of the agency.
 6. The rule that unless the ratification by the principal of the acts, doings or omissions of his agent be made with full knowledge of all the circumstances of the case, it will not be obligatory upon him, whether the principal's want of knowledge arises from the design, concealment or misrepresentation of the agent or from his own innocent inadvertence, *held* not applicable to executory contracts involving the features of this case.
 7. Long continued silence gives rise to a presumption of ratification.
 8. Objections to questions should specify the grounds of objection at the proper time; it is too late to make specific objections in this court.
 9. Unless the tender of a sum admitted to be due be unconditional, interest may be recovered thereon.

Appeal from District Court of Lake County.

THE facts are stated in the opinion.

Messrs. MARKHAM, PATTERSON and THOMAS, for appellants.

Mr. L. C. ROCKWELL, for appellee.

BECK, C. J. This is an action brought by the appellee, Armstrong, against the appellants, Higgins and others, composing a partnership or association of persons styled "The American Smelting Company," to recover damages for the alleged violation by said company of a contract to receive and pay for seventy-five thousand bushels of charcoal. The complaint alleges that the contract was entered into and executed on the part of the company by its agent, T. W. Robinson, who had authority to make and execute the same. It bears date March 24, 1879, and provides that Armstrong shall deliver to said company, at their smelting works in the city of Leadville, seventy-five thousand bushels of well-burned charcoal, at the price of seventeen cents per bushel, ten per cent. of the

contract price to be retained by the company until the completion of the contract. The coal was to be delivered in such manner that there should be not less than five hundred bushels on the grounds of the company at any time. The works were not completed until early in June, but the delivery of the coal was commenced on the 2d day of May, and continued until the 24th day of June, when Caleb B. Wick, who had been appointed the general manager of the defendants, refused to receive any more coal upon the contract, basing his refusal upon the ground that the coal being delivered was of inferior quality. The defendants, in their answer, denied all the allegations of the complaint, but their main ground of defense was that Robinson was not authorized to execute the contract for the company.

The principal legal questions involved in the case are raised by the eleventh assignment of errors, which calls in question the correctness of the third instruction given on the part of the appellee, Armstrong. In addition to this question, and connected with it, are two vital questions arising upon the record, viz.: Was this contract within the scope of Robinson's agency? If not, was it afterwards properly ratified or adopted as the act of the company?

Robinson was a metallurgist, and had experience in the construction and operation of smelting works. His original employment by the defendants was to erect smelting works for the company, and thereafter to remain as superintendent of the mixing and assaying of ores. Upon his arrival in Leadville, early in February, 1879, he brought two letters from H. I. Higgins, a member of the company, whose authority in the premises is conceded on both sides,—one addressed to J. J. Safely, the other to the Bank of Leadville. These letters are as follows:

Letter to J. J. Safely, dated February 10, 1879:

"Mr. Robinson leaves this morning for Leadville with

several men to put up building and machinery for smelters. Mr. Robinson will have charge of the erection of all buildings and machinery. We want you to be on the lookout constantly for our outside interests, and when you come across a good thing let us know. Do not buy any lots or other property without consulting us.

“JOHN V. AYERS’ SONS.

“H. I. HIGGINS, Trustee.”

Letter to the Bank of Leadville:

“FEBRUARY 10, 1879.

“This will serve to introduce to you Mr. T. W. Robinson, who goes to Leadville in our interests to erect smelting works. Any drafts of Mr. Robinson on us for money to pay freight on machinery, etc., for material and labor in erecting works, will be paid by us, and we shall be glad to have you honor the same.

“JOHN V. AYERS’ SONS.

“H. I. HIGGINS, Trustee.”

In addition to these letters the defendants Higgins, Otis and Wick testified that Robinson had no authority other than is expressed in the letters. Robinson being deceased, the parties were deprived of the benefit of his testimony upon the subject of his authority to make the contract in question.

The testimony shows that the company had mining interests at Leadville at and before the time of the arrival of Mr. Robinson, and that up to the time of his arrival it had an agent there in the person of Mr. Safely. Safely does not appear to have remained there after this date. Robinson appears to have been the only agent representing the company at that place from about February 15th to April 15th succeeding, when the defendant Caleb B. Wick was sent out by the company to take general management and control of all the company's property and business in and about Leadville. A review of the whole testimony affords ground for grave doubts whether the company's letters to Safely and the Bank of Leadville set

forth the full scope of Robinson's powers. His power to contract, in the name of the company, for lumber, stone, iron and other materials necessary in the erection of the works, and to hire men and pay freight, is not questioned. But defendants say this was the extent of his authority. The plaintiff's testimony shows that Robinson looked after the company's mining interests during the time of his sole agency, and paid men for prospecting and developing the same. Higgins mentions the fact that the company had mining interests at Leadville. The witness Sanderson says Robinson was paying for prospecting and developing mines, and building the smelting works. The plaintiff, Armstrong, says, when he first became acquainted with defendants they were erecting a smelter and engaged in a mining enterprise. He says he received money from the company through Sanderson, which was paid by Robinson, for work performed on the company's mines.

It is substantially conceded that Robinson's agency was not a special one, limited to the supervision of the work of erecting smelting works, nor ending with the completion of the buildings and machinery. His employment was a continuing one. On completion of the smelter he was to take charge of and superintend an important department of the work of smelting ores, which position he in fact filled for several months, as appears from the testimony of Mr. Higgins. The contract made by Robinson with the plaintiff for the delivery of the charcoal, as before stated, bears date March 24, 1879. This was while Robinson was the sole agent of the defendants at Leadville, and while he was looking after all their interests, according to the testimony referred to. It does not appear that any act of Robinson was disavowed, and it is probable that the charcoal contract would have fared the same as the mining transactions had not the price of charcoal greatly declined before the entire amount specified had been delivered. It is clear that if Robinson

looked after and expended money for the business interests of the company outside the smelting works and expenses of their erection, either by direction of the company, or by its permission or silence, knowing that he was performing such acts, the company would be properly held liable upon the contract for charcoal. The powers alleged to have been exercised by Robinson, if performed with either the express or implied knowledge of the company, cast upon it the responsibility of holding him out to the world as a general agent respecting the class of business in which the company was engaged. The rule in such case is that third persons, ignorant of the extent of the agent's authority, will be protected. It was a question for the jury, under proper instructions as to the law, whether or not Robinson was held out as a general agent in respect to the building of the smelter, and the procuring of the supplies to be used in running the same.

Developing mines in the vicinity might well be taken to indicate a design to use ore therefrom in operating the works. A supply of charcoal was just as essential to the operation of the works, under the process adopted, as mineral; for, by this process, charcoal was to be mixed, in certain proportions, with the ores to be smelted. If the facts are as claimed by the plaintiff, the case comes within the principle announced in *Jacobson v. Poindexter*, 42 Ark. 97, that the principal is bound by all acts of the agent within the scope of the authority, as held out to the world by the principal, although more limited private instructions have been given, which are unknown to persons dealing with him. See, to same effect, Whart. Ag. & Ag. § 126. The first coal received for the company under this contract was on the 2d day of May, 1879, and that was received by the general manager, Caleb B. Wick. We have the testimony of Mr. Higgins that Mr. Wick was, at this time, an owner in the company. Mr. Higgins says: "Mr. C. B. Wick, being an

owner in our concern, went out to take general charge." Wick continued to receive coal upon the contract, paying therefor according to the terms and conditions specified therein, until the 24th day of June, when he refused to receive any more for the reason above stated. Upon the 14th day of June he addressed to Higgins a letter on the subject, of which the following is a copy:

"LEADVILLE, June 14, 1879.

"*H. I. Higgins, Esq., Trustee* — DEAR SIR: Mr. Robinson contracted for charcoal,— one hundred and thirty-five thousand bushels at seventeen cents per bushel. One party has a written contract to furnish seventy-five thousand. He was not responsible, and it was too much of a one-sided contract. I am buying charcoal at from eight to ten cents per bushel, making a difference in our contract of some \$6,000. Mr. Otis informed me that Mr. Robinson had no authority to make such contracts.

"Yours truly, CALEB B. WICK."

Mr. Higgins answered promptly, and declared that the company would not recognize the contract. It will be observed, however, that he did not place the repudiation upon the ground that Robinson *had no authority* to purchase or contract for charcoal. Here are the grounds for the disavowal, in his own words: "Mr. Robinson had no authority to purchase or contract for large quantity of charcoal for our company." The jury might well infer from this reply, taken in connection with the suggestive character of the letter of inquiry from Wick, that Robinson had authority both to purchase and contract for charcoal for the smelter, an implication arising from the reply that he was limited only as to the quantity. Such limitation, however, would be of no force in the absence of notice to the other contracting party.

Wick attempts to excuse himself for receiving and paying for coal upon this contract from May 2d to June 24th upon the plea that he supposed Robinson had authority to make it. That is just what Armstrong sup-

posed, and the indications are strongly to the effect that both the general manager and the vendor had good reason to believe in Robinson's authority. The former, as Mr. Higgins says, *was an owner in our concern*, and having acted as general manager for several days prior to the delivery of any coal under the contract, doubtless supposed that he understood the details of the whole business. A duplicate of the contract was in his office, and he had ample opportunity to examine it, ascertain how the price therein stipulated compared with the market price, and to inquire into the authority for making it. The other party, Armstrong, had known Robinson since his arrival in Leadville. He knew of his contracts, both for the smelter and the mines, and had, according to his testimony, received money paid by him for work done on mines of the company. He judged, from the character of his dealings and the apparent recognition of his agency, that he was authorized to contract for supplies, both to build and to operate the smelter. That an agency may be proved by the habit and course of dealing between the parties is clear upon principle and authority. *Union G. M. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 570; *Franklin v. Globe Ins. Co.* 52 Mo. 461.

We do not lose sight of the fact that one member of the company testified that Robinson had no authority to contract for supplies, and that another member, Higgins, testified that he was not authorized to contract for a large quantity. In connection with this, however, must be considered other testimony in the case, which shows that during the period in which Robinson was the sole representative of the company at Leadville he looked after certain outside matters, all of which, however, had reference in some degree to the general business of the company, and connected with its smelting operations. A person situated as plaintiff was would naturally, therefore, suppose that the agent was duly authorized to contract for all materials in any way relating to the smelting

works. It is our best judgment that the jury would have been warranted in finding that the agent Robinson had original authority to contract for the charcoal.

The next question to be considered is that of ratification. If the acts and conduct of the company did not amount to an original authority for the making of this contract by Robinson, has not the company, by its subsequent acts, ratified or adopted it? We have seen that Mr. Wick was appointed general manager of the company after the making of the contract, but before anything was done under it and while it remained executory. He arrived in Leadville after his appointment, some time in April,—probably about the 15th of that month. His powers, as stated by Mr. Higgins in his deposition, were “a general management of all our affairs in Leadville connected with mines and smelter, and he was authorized to make contracts.” Mr. Wick himself thus states his powers: “With full power to make all contracts, purchases and sales.” The American Smelting Company was not a corporation, but a copartnership. The testimony, however, does not warrant the inference that it was an ordinary or commercial partnership, since no partnership organization was shown. It appears to have been an association of individuals for the purpose of prosecuting a certain business venture, which was the operating of mines and smelting works at Leadville. It may, therefore, be appropriately denominated a “mining partnership,” since the business related to mining projects. It was held in *Charles v. Eshleman et al.* 5 Colo. 111, that a mining partnership exists where the several owners of a mine co-operate in the working of the mine. Here the several owners in the “concern,” as Mr. Higgins calls it, co-operated in carrying on certain mining operations.

The courts hold that a mining partnership is governed by many of the rules relating to ordinary partnerships, but differing therefrom in many important particulars;

as, for example, a member may assign his interest without the consent of his copartners, and the act does not work a dissolution of the partnership. The person to whom the interest is assigned becomes a member of the company, and it is not necessary that the other members consent thereto. Neither does the death of a member dissolve the partnership; new members come into a mining association against the wishes of other members. On the other hand, a mining partner has not the power to bind his associates by engagements with third persons to the extent that a member of a trading or commercial firm may do. In illustration of this principle, it was held that the law does not imply authority to a member of a mining partnership to execute a promissory note, or to draw or accept a bill of exchange, in the name of the firm; also, that the act of employing counsel to litigate the title to a mine does not come within the limited powers vested in a mining partner, but that the powers of members and managers of such companies are limited to the performance of such acts, in the name of the partnership, as may be necessary to the transaction of its business, or which is usual in like concerns. It is further stated that a partnership may be formed for mining purposes that would possess all the elements of a commercial partnership, and which would subject its members to the same rules and liabilities.

So far as the powers of a partner to bind the firm in the usual course of the partnership business is concerned, it is held that the same principles apply in mining partnerships as in the case of ordinary partnerships. The rule upon this subject, as announced in Pars. Part. 95, is that every partner has full and absolute authority to bind all partners by his acts or contracts in relation to the usual business of the firm, in the same manner and to the same extent as if he held full power of attorney from all of the members, and that this principle rests, not only on universal usage and on universal authority, but on

obvious reason and necessity. *Charles v. Eshleman et al. supra*, and cases cited. In accordance with this principle it was held in *Manville v. Parks et al.* 7 Colo. 135, that where a member of a mining partnership purchased articles essential to the carrying on of the business, the debt being created in the necessary and usual course of the business, and within the scope of the partnership venture, the individual member who made the purchase had lawful authority to contract the debt, and to bind his copartners thereby.

The regularity of Robinson's appointment as an agent of the company is not disputed, but the defendants allege that he exceeded his powers in entering into the charcoal contract. They also contend that it was never legally ratified either by Wick, the general manager of the company, or by the company. Whether it was ratified by the company or not depends upon the facts in the case. The regularity of Robinson's appointment as a representative of the company being conceded, it follows, as a necessary sequence, that the company was chargeable with knowledge of the scope of his powers as agent. If, then, Robinson exceeded his powers in assuming to bind the company by the charcoal contract, it became the duty of the company to disavow the act within a reasonable time after notice in order to avoid liability thereon. If the company remained silent for an unreasonable length of time after actual or constructive notice of the existence of an unperformed contract for supplies for its smelting works, with notice that tender of performance had been made by the contractor, Armstrong, and that the charcoal contracted for was being received and paid for by Manager Wick according to the terms and conditions of the contract, such silence would raise a presumption of ratification. We have already alluded to the plenary powers conferred by the company upon Mr. Wick, as agent and manager of the company. It is a well-established rule of law that notice to the agent is

notice to the principal of matters falling within the scope of the agency. Power to make contracts for supplies to run the smelter was peculiarly within the scope of Wick's agency. It becomes material, now, to know when the existence of this contract came to his notice.

Mr. Wick admits that he saw a duplicate of the contract in the office of the company, but apparently evades the inquiry, when it first came to his notice. The interrogatories and answers upon this point are as follows:

"*Interrogatory 10.* When did you first learn of the existence of a certain contract or agreement for the purchase of charcoal from the plaintiff, and made with him by Robinson, pretending to act for and represent the defendants? *Answer.* I don't remember the exact time. My recollection is that some time after I arrived in Leadville, in looking over some papers, I found that contract. *Int. 11.* When did you first see the contract? *A.* I saw it as stated in interrogatory 10, and that was the first I ever heard of it."

These answers, taken in connection with his statement of the time of his arrival in Leadville, to wit, "*in the month of April,*" are rather indefinite. The inference from his acts and testimony is that he saw the contract before any coal was delivered thereon. Mr. Armstrong commenced delivering coal to the smelter, as stated, on May 2d. Mr. Wick received the quantity delivered on that day, and continued to receive the coal as it came, the daily average being about three hundred bushels, until an aggregate of thirteen thousand seven hundred and seventy-three and one-half bushels had been received, and payment made thereon according to the terms and conditions of the written agreement. It is evident, therefore, that he was acquainted with these terms and conditions from the first. One of the conditions was that ten per cent. of the contract price was to be retained by the company as security for the full performance of the agreement on the part of Armstrong. So far as the evi-

dence shows, no objection was made known to the plaintiff by Mr. Wick that the contract was not a valid one, or that there was any want of authority on the part of Robinson to execute the same, or that the coal was of inferior quality, until the 24th day of June, at which time Wick refused to receive any more coal upon the contract, alleging as ground of refusal that the coal was of inferior quality. Mr. Wick attempts to explain away the legal effect of his action in receiving a large quantity of coal upon the agreement before disavowing it, by claiming that he did not know of the extent of Robinson's powers as agent of the company, but supposed he had authority to contract for supplies for the smelter. During all this time Mr. Robinson remained in the employ of the company, as is apparent from the testimony of Higgins, who says, in his deposition, that he thinks Robinson remained several months with the company after the appointment of Wick, his duties being to superintend the smelting of ores and the mixing and assaying of ores.

It does not appear from Wick's testimony or otherwise that he made a single inquiry of Robinson, or of any member of the company, concerning the authority of Robinson to enter into the contract, on the part of the company, until the 14th day of June. But the significant fact does appear, both from Wick's letter to Higgins and from other evidence, that, when he did commence to inquire about Robinson's authority in the matter, the price of charcoal had declined in the market from seventeen cents, the contract price, to eight and ten cents per bushel. In view of the relation which Wick sustained to the company, and the knowledge which he possessed by the inspection and custody of the duplicate contract, his failure to inquire into its validity before proceeding to perform it on behalf of the company is not avoided by the explanation offered, that he supposed Robinson had authority, as agent of the company, to make it.

The situation may be illustrated by that of a single principal and a single agent. The agent contracts for articles necessary to the business of the principal, but the contract is outside the scope of the agent's authority. While it remains wholly unperformed and simply executory the contract is brought to the notice of the principal. Afterwards, tender of performance is made by the opposite party. Will it be contended that the principal may remain silent, and join the opposite contracting party in performing the contract, until, from change of circumstances, it becomes his interest to repudiate it, and that he may then do so on the ground of want of authority in the agent to enter into the agreement? The case here presented does not differ, in legal effect, from the one supposed, upon the facts appearing in the record before us. An owner in the company, whose relation to it may be found by the jury to be that of a partner, is put in charge of the entire business of the firm. His acts are those of the company. His authority extends to the making of just such contracts as the one in controversy. He has not only notice of its existence, but voluntarily enters upon its performance, and continues in such performance for a period of fifty days. All these things come within the scope of his authority. The agent, then, has notice of the contract, its terms and conditions, and of the tender of performance. He accepts the coal as delivered on the contract without inquiring into the validity of the written agreement, shutting his eyes to the means of knowledge within easy reach. The law applicable to such facts is that notice of the matters aforesaid to the agent is notice to the company, and that the acts of the agent are the acts of the company. Upon such a state of facts, and after such long silence, the company cannot avail itself of a lack of authority in Robinson to make the contract.

The rule laid down in Whart. Ag. §§ 177, 178, is that the principal is bound by all notices coming to the agent

relating to matters within the scope of his agency, when such notices would have bound the principal if given directly to himself. Mr. Story announces the principle that notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from, or is at the time connected with, the subject-matter of the agency. He puts it upon the ground that, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal, and if he does not, still the principal having intrusted his agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal; otherwise the negligence of the agent, whether designed or undesigned, might operate injuriously to the rights and interests of such party. Story, Ag. § 140. This court has held that notice of facts to an agent, where the matter is within the scope of his agency, affects the principal, though not in fact communicated. *Union G. M. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 565. Another rule applicable to the present case is that notice to an agent is notice to the principal, if the agent comes to the knowledge of the fact while he is concerned for the principal, and in the course of the very transaction which becomes the subject of the suit. *Hiern v. Mill*, 13 Ves. 120; Ewell's Evans, Ag. 159.

Counsel for appellant rely upon a doctrine laid down in Story, Ag. § 239 *et seq.*, to the effect that unless the ratification by a principal of the acts, doings or omission of his agent be made with full knowledge of all the circumstances of the case, it will not be obligatory upon him, whether the principal's want of knowledge arises from the design, concealment or misrepresentations of the agent, or from his own innocent inadvertence. This doctrine may be applicable to the case of a special agency, as the employment of an agent for a single transaction, or it may be applicable to completed trans-

actions, but it is not applicable to executory contracts, involving the features of the present case.

Counsel also rely upon the following paragraph, taken from the syllabus of the case of *Combs v. Scott et al.* 12 Allen, 492:

“Ratification of the unauthorized acts of one who assumes to be an agent, in order to render them binding upon the principal, must have been made with full knowledge of all material facts, and ignorance of such facts, whether it arises from want of inquiry by the principal and neglect to ascertain the facts, or from other causes, will render an alleged ratification ineffectual and invalid.”

Upon these authorities it is contended that the acts of Wick did not operate to bind the company, because he was, at the time, ignorant of the scope of Robinson's authority. We have shown why such ignorance as that claimed by and in behalf of Mr. Wick does not avail. It was voluntary and wilful ignorance, where the means of knowledge was at hand. It was in a case where the person contracting to furnish supplies had relied upon the authority of an agent of the company, who had been permitted, if not authorized, to act generally for the company in relation to the same class of business, the company recognizing his acts by paying the bills so contracted, whereby this party was misled to his prejudice. The case from 12 Allen was in relation to a contract to procure two recruits, and to secure their enlistment in the United States army. It was that of a special agency, confined to a single transaction, and the services were to be performed for a stipulated consideration. It is in no manner analogous to the case before us. Besides, that portion of the syllabus above quoted does not truly state the ruling of the court. The rule announced was that the ratification of a *past and completed transaction*, into which an agent has entered without authority, is a purely voluntary act on the part

of the principal, and no duty requires him to make inquiries concerning it. But the case further holds that a person cannot be wilfully ignorant, or purposely shut his eyes to means of information within his own possession and control, and thereby escape the consequences of the ratification of unauthorized acts into which he has deliberately entered. The rule was confined to a past and completed transaction, not to an executory contract, where constructive notice of the contract was brought home to the principal before ratification. The company had constructive knowledge that Robinson had made a contract with Armstrong for supplies, and of the terms and conditions specified therein, before any steps were taken to perform it, either by Armstrong or Wick. This was knowledge of all the essential facts necessary to a ratification by the company. The company failed to disavow the act upon discovery of the existence of the contract, and for an unreasonable length of time after the plaintiff commenced performance on his part. Such long-continued silence gives rise to a presumption of ratification by the company. *Union G. M. Co. v. Rocky Mt. Nat. Bank*, 1 Colo. 531; *S. C.* 2 Colo. 565.

Another view of the case may be predicated upon the theory of Wick's relations as a copartner with Higgins, Otis, Ayer, and other members of the association. He was sued as a member of the firm. His ownership therein was affirmatively asserted in the deposition of Higgins, and it was not positively denied by Wick himself. Although not one of the original members of the association, his interest attached before going to Leadville. When asked by defendants' counsel who composed the firm or association, he answered by giving the names of those who were members "in the early part of '79." This answer evidently referred to the original members of the association. Being asked by plaintiff's counsel, on cross-examination, whether there was an association of individuals, of which he was a member, formed for the pur-

pose of transacting business in Lake county under the name of the American Smelting Company, he answered: "There was an association known as the American Smelting Company, in which I had a conditional interest." What the *condition* was he does not state, nor was there anything in the testimony to show that his interest did not constitute him a member of the company.

On the other hand, Mr. Higgins' testimony tends strongly to show that Mr. Wick was a member. Mr. Higgins stated in his deposition that, upon the completion of the smelter by Robinson, "Mr. Wick, being an owner in our concern, went out to take general charge." Upon the testimony the jury may have found his relations to the company to have been both that of proprietor and general manager. As a member of the partnership, he would be chargeable with notice of the appointment of his agent, Robinson, and of the scope of his agency. He would, consequently, be estopped from pleading his ignorance of Robinson's authority as an excuse for the course pursued by him in so long treating the contract as a valid one. Having plenary powers in such matters, both as principal and agent, his acts in carrying out or performing the contract would be equivalent to an adoption of it. Its adoption by Wick would have validated it to the same extent as if originally signed by his own hand instead of the hand of Robinson. Under the same view of Wick's relations to the company, his acts would amount to a ratification of the contract, and be equally binding upon the company. The objection made to the quality of the charcoal which was being delivered under the contract at the time of Wick's refusal to receive any more thereon does not appear to be supported by the evidence; hence this ground of repudiation cannot be sustained.

The foregoing views are supported by the following rules and citations: "If one partner enter into a transaction with third persons, within the scope of the part-

nership business, all members of the firm are bound. Pars. Part. 219. Every member of an ordinary partnership is its general agent for the transaction of its business in the ordinary way, and the firm is responsible for whatever is done by any of the partners, when acting for the firm within the limits of the authority conferred by the nature of the business it carries on. The principal is bound by the ratification or adoption of transactions by his agent, if the agent had the authority to do the thing which he ratified or adopted. *Whitehead v. Wells*, 29 Ark. 99; *Irwin's Appeal*, 85 Pa. St. 299; *Palmer v. Cheney*, 35 Iowa, 281; *Ewell's Evans*, Ag. 54. The supreme court of Alabama says: "Both principal and the agent may ratify acts of an unauthorized person, and the principal is bound by the ratification or adoption of its agent if the agent had authority to do the thing which he ratified or adopted. *Mound City Mut. Life Ins. Co. v. Huth*, 49 Ala. 539. The distinction made between ordinary partnerships and mining partnerships does not interfere with the above principles in their application to the present case.

The objection urged by appellant to the third instruction given on the part of appellee cannot be sustained, since the instruction contains no fatal error. It is true the instruction is inartificially framed, but the propositions of law contained therein are substantially correct. The first proposition is based upon the theory that the defendants "authorized or permitted" their agent, Robinson, to act generally for them in and about their business in and about Leadville, and that, acting under such authority, he made the contract in question, and deposited it in a proper place in the office of the company.

The jury is then informed that if such be the facts, and that the company proceeded through their agent, Wick, without objection, to perform the contract on its part, they may find either an original authority in the agent or a ratification by the principal. The second

proposition relates wholly to a ratification of the act of the agent Robinson by the company, after full information through Wick of the existence of the contract. This proposition is, that if defendants, through Wick, after being fully informed of the making of the contract, proceeded to acknowledge its validity, and to act under it by receiving and paying for the coal as delivered, the jury may conclude from such transactions that the company ratified the contract. The legal propositions here laid down do not seem to be in conflict with the views which we have advanced, nor with the authorities cited in support thereof.

The remaining questions presented by the record are of minor importance, and may be briefly disposed of.

The second and tenth assignments of error relate to the measure of damages and involve one interrogatory and one instruction to the jury. The plaintiff was asked, upon the witness stand the following question: "Mr. Armstrong, what was the market price of charcoal on the 19th day of June, 1879?" The objection made at the time was a general one. The specific point now made is that the inquiry was not limited to some place in particular. Had this objection been made at the time, it is probable that the question would have been changed so as to obviate the objection raised.

A similar objection was made to the second instruction. It lays down the rule of damages, in case the jury find for the plaintiff, to be the difference between the contract price and the market value of charcoal at the time the defendants refused to carry out the contract. That the element of place was not mentioned in the question to the witness, and in the instruction to the jury, cannot be held to be error in the present case, for the reason that no other market place than Leadville was referred to in the trial of the cause. It was therefore impossible for the jury to have misunderstood to what place the testimony and the instruction referred.

We are also of opinion that the rule of damages laid down by the court was correct.

The fourth assignment of error relied upon was the overruling by the court of appellants' objection to the question propounded to the witness Gerrish requiring him to state whether, during the time the coal was being delivered and used at the furnace, he heard any objections made to its quality. The answer to the question was, "None whatever." It is argued that this answer was misleading to the jury because no relations existed between appellants and the witness Gerrish which required appellants to complain to him or in his presence of the charcoal. The question appears to have been a proper one, considering the qualifications and opportunities of the witness to judge of the quality of the coal delivered. The testimony of Mr. Gerrish shows that he was employed as an expert in the works to assist Robinson in getting them properly started; that he was familiar with the smelting of ores; was by profession a metallurgist, having had, as he states, a good many years' experience in smelting ores with the use of charcoal; and that the duties imposed on him by the appellants were to instruct the men how to mix the ores and coal to make it burn, and how to prepare their furnace in order to make it run. In reference to this process of smelting by the use of charcoal he states that he was the first to introduce it into Leadville. It also appears from the testimony of this witness that he was in the employ of the appellants a sufficient length of time to be able to judge of the character of the charcoal being delivered by Mr. Armstrong. In addition to answering the question that he heard no objection whatever to the coal delivered by Armstrong, he said he had remarked, on seeing some of the coal delivered, that it was the best charcoal he ever saw burned in pits, and that he heard no complaint from Robinson. Another objection is that the question referred simply to the character and quality

- of the coal being delivered, whereas the testimony shows that it was also to be free from stones and dirt. The contract was in writing, and in reference to the character and quality of the charcoal it merely says that the appellee was to deliver "seventy-five thousand bushels of well-burned charcoal."

The eighth assignment questions the correctness of an instruction given by the court upon its own motion relating to the allowance of interest upon the sum admitted to be due the appellee at the time of the refusal to receive any more coal upon the contract. The jury were instructed to allow interest at the rate of ten per cent. per annum upon the sum of \$485.47, admitted to be due appellee, but not to allow interest on the sum contested, if they should find the appellee entitled to any other or further sum of damages. This assignment is considered in connection with the sixth assignment of errors, which latter assignment relates to an instruction prayed for by appellants and refused by the court. The latter instruction asked the court to instruct the jury that, if the appellants, before suit brought, had tendered the sum of \$485.47, without any restrictions, in payment of the amount then due appellee for charcoal delivered, and that he refused to receive it, no interest should be allowed upon such sum. We have considered the evidence relating to the tender, and the testimony of defendant Wick, alone, shows that no unconditional tender was made. There was, therefore, no error in giving the appellee's instruction, or in refusing that prayed for by appellants.

We have examined all the errors assigned, and find none of sufficient importance to justify a reversal. The judgment is affirmed.

Affirmed.

9	60
9	371
11	430
9	60
15	102
9	60
4a	473
9	60
5a	68
7a	197
9	60
11a	340
9	60
13a	516

CAMPBELL V. THE COLORADO COAL AND IRON CO.

1. When the same persons carry on the same business as partners in two different places, and under different firm names, there is in law but a single partnership, and the assets of both nominal firms are equally applicable to the payment of all the creditors.
2. It may be considered a settled doctrine that voluntary assignments for the benefit of creditors, which are valid in the state where the owners reside, will be held to pass personal property included, the *situs* of which is in other states.
3. Section 68 of the General Statutes relates to general assignments for the benefit of creditors, and does not prevent the making of partial assignments by insolvent debtors.
4. So long as the debtor retains dominion over his property, in the absence of statute and of fraud, he may transfer, incumber or dispose of it as he pleases.
5. Under the statute, section 68, where a debtor makes an assignment of part of his property for the benefit of creditors generally, and at or about the same time conveys, by separate instruments, the balance thereof, either as payment or security, to particular creditors, and the circumstances are such as to indicate that he may thereby have attempted an evasion of the statute above mentioned in so far as it relates to preferences, yet that portion of the transaction represented by the assignment, if in and of itself not tainted with fraud, may stand. The statute, in such case, could operate only to invalidate the preferences given, in an action brought by and against the proper parties.
6. The principle that a deed which is partly void, as against the provisions of a statute, or as against the common law, is void altogether, has no application to a case like the one at bar.
7. Section 1520 of the General Statutes, relating to the conveyance of chattels for the grantor's benefit, refers to cases where the use or trust for the grantor is the principal purpose accomplished by the conveyance, and not merely an incident thereto.

Error to Superior Court of the City of Denver.

PETITION for rehearing.

The cause was tried upon an agreed statement of facts. This statement is, in brief, as follows:

Ferdinand Jensen and William M. Bliss were engaged as partners in mercantile business at Denver, Colorado, and Deadwood, Dakota. The firm name, at the former

place, was Jensen, Bliss & Co.; at the latter, it was Jensen & Bliss. At the hour of 7 o'clock P. M., October 1, 1884, Jensen, Bliss & Co. made an assignment of certain claims, demands, notes and accounts, aggregating in value about \$13,500, to one Metcalf, for the purpose of paying or securing a *bona fide* firm indebtedness of \$20,000. At the same time, and for a like purpose, Bliss also executed to Metcalf a trust deed upon certain realty, the title of which was in the former's name alone. At the hour of 9 P. M. of the said October 1st the firm executed and delivered to R. A. Campbell, as assignee, an assignment of all the partnership property, "of every name and nature within the state of Colorado," for the equal benefit "of each and every of our creditors in both branches of our said business and everywhere." Prior to this, and about September 20, 1884, the attorney of the firm was directed to draw both of said assignments. The one to Metcalf was prepared by said attorney on said September 20th, and other four days later, to wit, September 24th. On the 29th day of September, without the knowledge of Metcalf, an entry was made upon the books of the firm of the transfer to him of the choses in action mentioned in the written assignment made for his benefit. At the time of the assignment to him, Metcalf knew that the assignment to Campbell was about to be made; but the assignee, Campbell, was ignorant, when he accepted the trust, of the Metcalf transaction. On the 2d and 4th days of October, 1884, the firm of Jensen & Bliss executed and delivered mortgages to certain of their Deadwood creditors upon their Deadwood property. Though the nature of this property is not specifically stated in the record, yet we are sufficiently advised to say that a large part of it was personalty. During all of the preceding transactions, both nominal firms were insolvent. November 8th following, plaintiff, the Colorado Coal & Iron Company, being a *bona fide* creditor of Jensen, Bliss & Co., brought an action against the firm for the amount

of its claim, and caused a writ of attachment to be levied upon the property in the hands of Campbell as assignee. The latter intervened in this attachment proceeding, claiming the property by virtue of the assignment aforesaid.

Judgment was rendered against the intervenor, and in favor of plaintiff, whereupon the former sued out this writ of error. The principal question presented for determination related to the validity, under all the foregoing circumstances, of the assignment to Campbell.

Messrs. E. O. WOLCOTT, A. E. PATTISON and J. F. VAILE, for plaintiffs in error.

Messrs. R. D. THOMPSON and J. M. WALDRON, for defendant in error.

HELM, J. We are now satisfied that upon one of the material questions considered in the opinion of the court, written by myself, and filed in this cause, an erroneous conclusion was reached. That opinion is accordingly withdrawn. The views therein expressed which are still adhered to, as well as those resulting from our further investigation upon this rehearing, are embodied in the following opinion, which will be substituted therefor.

1. Since the persons constituting both the firms mentioned in the agreed statement were the same, and they were engaged in carrying on the same business in both places, there was in law but a single partnership. The fact that there were two partnership names is of no importance, and "the assets of both nominal firms were equally applicable to the payment of all the creditors." *In re Williams & Co.* 3 Woods, C. C. R. 493, and authorities there cited. We shall, therefore, in the discussion of this case, adopt the theory that there was but a single partnership, which was engaged in business at the two places mentioned; and that the Colorado creditors and

the Dakota creditors were equally interested in the partnership assets, whether at Denver or Deadwood.

2. It may be considered a settled doctrine that voluntary assignments for the benefit of creditors which are valid in the state where the owners reside will be held to pass personal property included, the *situs* of which is in other states. The assignees take title thereto unembarrassed by the claims of creditors, residing where the property is situate, who have not obtained a prior lien by levy of attachment or other process. We are not here concerned with the qualification of this doctrine recognized by some of the decisions, where the "foreign assignment is repugnant to the policy or laws of the state in which domestic creditors have attached property located therein." It follows from the foregoing propositions of law that Jensen, Bliss & Co. might have included in the assignment to Campbell their Dakota personal property also. In view of this fact, and of the matters set forth in the agreed statement, we proceed to briefly examine the law governing assignments for the benefit of creditors in Colorado.

3. Section 68, General Statutes, reads as follows:

"Whenever any person or corporation shall hereafter make an assignment of his or its estate for the benefit of creditors, the assignee named in the deed of assignment, appointed or selected, shall be required to pay in full, from the proceeds of the estate, all moneys *bona fide* due to the servants, laborers and employees of such assignors for their wages accruing during the six months next preceding the date of such assignment, but to exceed, in no event, the sum of \$50 to any one person then remaining unpaid. All the residue of the proceeds of such estate shall be distributed ratably among all other creditors, and any preference of one creditor over another, except as above allowed, shall be entirely null and void, anything in the deed of assignment to the contrary notwithstanding."

We think that the word "estate," used in this statute, means all of the debtor's property, both real and personal, not exempt from execution, and hence that the statute was designed by the legislature to cover general assignments. We are satisfied that, in this respect, no distinction can fairly be drawn between section 68 and the statutes of other states on the subject wherein the expression "general assignment" occurs. Therefore, in our judgment, an important question presented is, are partial assignments prohibited or interfered with by this provision? To satisfactorily answer the foregoing question, it is necessary for us to look beyond the statute, and consider the common law. We use the term "common law" in its broader sense, as including those doctrines of equity jurisprudence which have not been expressed in legislative enactments.

4. A fundamental principle underlying this subject is that, so long as the debtor retains dominion over his property, in the absence of statute and of fraud, he may do with it as he pleases. He may transfer the whole of his estate in payment or in security of a single *bona fide* debt. He may assign, mortgage or otherwise incumber his estate, or a part thereof, in favor of some of his creditors, excluding the rest; or he may make an assignment for the benefit of all his creditors, and therein give preferences to a selected few. It is only when, either by a general assignment or otherwise, the debtor has parted with the dominion over his property, that, in the absence of statute or fraud, the foregoing privilege is forfeited. Bur. Assign. (3d ed.) §§ 160, 161, and cases cited; *Lampson et al. v. Arnold*, 19 Iowa, 479, and cases cited; *Worman v. Wolfersberger's Ex'rs*, 19 Pa. St. 59; 2 Kent, Comm. (12th ed.) 532, and cases cited, as to assignments. While, at first, this common law doctrine may seem somewhat inequitable, yet, upon reflection, it clearly appears to be supported by at least one consideration of the most weighty import. To hold that debtors may not

give preferences among their *bona fide* creditors, so long as they control their property, would greatly embarrass the transaction of nearly all kinds of business. Some of the authorities go so far as to say that such a rule would prevent the carrying on of business altogether. "Whilst a man retains dominion of his property, he may encumber and convey it as he pleases, if not directly forbidden by law, and prefer such creditors, by payment or transfer, as he chooses; and if it were not so, an individual could not get along in his business." *Blakey's Appeal*, 7 Barr, 449. "If, while a man retains his property in his own hands, the right of giving preferences should be denied, he would so far lose the dominion over his own that he could not pay *anybody*, because whoever he paid would receive a preference." *Tillou v. Britton*, 9 N. J. Law, 120. "Any enactment which takes away the right of a debtor to prefer them [creditors] would produce a sudden change, so extensive in all business transactions that its policy is somewhat questionable." *Worman v. Wolfersberger's Ex'rs*, *supra*.

Recurring to the question already propounded: Does the statute under consideration so far change the foregoing common law principle as to prohibit preferences in favor of chosen creditors by means of *partial* assignments? If the expression "his or its estate," therein contained, means, as we have concluded it does, all of the debtor's property not exempt from execution, then the statute may read: "Whenever any person or corporation shall hereafter make a general assignment of his or its estate for the benefit of creditors," etc. The general rule is that statutes in derogation of the common law are to be strictly construed. Certainly a proper regard for this rule forbids the enlargement of a statute by construction, so as to include common law principles not clearly within its language or spirit. In so far as the section before us prohibits preferences in general assignments, it unquestionably modifies and restricts the com-

mon law; but if the legislature had intended to further change the common law, and deny preferences through *partial* assignments, it should have said so, as like bodies elsewhere have done, in unequivocal language. The courts should not have been left to infer this meaning from the expression used.

In Iowa a statute reading as follows, "No general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors of the assignor shall be valid unless it be made for the benefit of all his creditors in proportion to the amount of their respective claims," was held not to inhibit the making of partial assignments. The court say: "Nor does the statute prohibit or interfere with the right of any debtor as it existed prior to the statute to make a partial assignment." *Lampson et al. v. Arnold, supra; Davis & Co. v. Gibbon*, 24 Iowa, 257.

A similar construction was placed upon the following Alabama provision: "Every general assignment made by a debtor, by which a preference or priority of payment is given to one or more creditors over all remaining creditors of the grantor, shall be and inure to the use and benefit of all the creditors of the grantor equally." *Stetson & Co. v. Miller*, 36 Ala. 642.

An act of congress provided, in effect, that when "a debtor, not having sufficient property to pay all his debts, shall have made a voluntary assignment thereof, for the benefit of his or her creditors," claims of the United States should be preferred. The supreme court denied the preference where a partial assignment only was made. That court, speaking through Chief Justice Marshall, says: "Had the legislature contemplated a partial assignment, the words 'or part thereof,' or others of similar import, would have been added." *U. S. v. Hooe*, 3 Cranch, 73; *Conard v. Atlantic Ins. Co.* 1 Pet. 386; *U. S. v. Howland et al.* 4 Wheat. 108.

The legislature of New Hampshire adopted a statute

providing, in substance, "that no assignment made for the benefit of creditors of any debtor so assigning his property shall be valid in law except the same shall provide for an equal distribution of all the debtor's property among his creditors, in proportion to their respective claims." The court say with reference thereto:

"It never could have been the intention to prohibit a debtor from assigning any particular property he might possess for the purpose of paying any particular debt or debts that he might owe. Such a prohibition would be absurd, so long as any creditor or creditors are permitted, as they are by our laws, to attach any property of the debtor and thus apply it to the payment of their debts, without the consent of the debtor." *Meredith Manuf'g Co. v. Smith*, 8 N. H. 347.

Again, on the same subject:

"We are of opinion that the assignments intended by the statute are general assignments, purporting to convey all the debtor's property to trustees for the benefit of all his creditors," etc. *Low v. Wyman*, 8 N. H. 536.

In Vermont there was enacted a statute providing that all general assignments thereafter made for the benefit of creditors should, as to such creditors, be null and void. With reference to this statute, the following language is used in one of the opinions of the supreme court:

"I take it the statute, at least, prohibits an assignment of all the property of an insolvent debtor to a trustee for the benefit of all his creditors, even though they are to enjoy it *pro rata*; while it allows a preference to be given to favorite creditors, to the exclusion of others, and especially if the insolvent excepts from the assignment a remnant of his property. Thus equality among creditors is discountenanced, in disregard of the long established maxim that equality is equity." *Hall et al. v. Denison*, 17 Vt. 310.

Our conclusion, based, as we think, upon both principle and authority, is that the statute under consideration

should not be construed as prohibiting or interfering with the making of partial assignments; that, so far as the statute is concerned, such assignments are perfectly valid. The repeal of the act in question, and substitution therefor of a more comprehensive law, by the fifth general assembly, being subsequent to the transactions involved, could not in any event affect the decision of this case. Since the deed to Campbell omits all personal property of the firm at Deadwood, it is a partial assignment. It follows from the foregoing conclusion that this assignment was valid at common law, and that the statute then existing had no application thereto. We do not deem the suggestion made in *Van Patten v. Burr*, 52 Iowa, 518, distinguishing between assignments directly to the creditor in *payment*, and assignments in trust for creditors, sufficiently supported by either reason or authority to warrant a modification of the foregoing views.

5. But counsel for defendant in error argue that the deed to Metcalf, the assignment to Campbell, and the Dakota mortgages were all executed in pursuance of a single design on the part of the partnership, and consequently those instruments represent but one transaction; that it was the intention of the partners to make a general assignment, with preferences, but that for the purpose of evading the statute, and securing the preferences which it prohibited, they devised and executed the plan of preferring the favored creditors in separate writings. Upon these grounds counsel base the conclusion that the assignment in question should be held void. It may be impossible, considering the facts before us, and the view that our statute did not prevent partial assignments, to say that a general assignment could not have been here contemplated, or that an evasion of the statute was attempted; but admitting, for the purposes of argument, the correctness of the foregoing premises stated by counsel, we are satisfied that the conclusion they draw therefrom is unsound. There is no language in the statute

which, under any circumstances, invalidates the assignment itself. The preferences only are declared to be void. In this respect it is unlike corresponding provisions which now exist or have existed in Massachusetts, Iowa, Alabama and other states. If preferences were given in the deed of assignment, no one contends that the assignment itself would thereby fail; but if preferences stated in the instrument would be harmless, why should the declaration thereof through separate writings render the assignment void?

The fact that an insolvent debtor clearly attempts to evade the statute by preferring certain creditors in separate transfers or instruments conveying portions of his property at or about the time he makes a general assignment, if such fact can be and is established, may be a reason for avoiding the preferences so given, in a suit by or on behalf of injured creditors; but it is not a reason for declaring the assignment itself invalid. The assignment, this being the only objection thereto, may well be permitted to stand, and the property included be distributed ratably by the assignee among the creditors. The purpose of the statute was not to discourage or restrain the making of general assignments, but to inhibit partiality therein toward favored creditors. To say that the assignment itself must fall on account of the attempted evasion of the provision relating to preferences, is to give an effect to the law which the legislature did not express, and which we are satisfied it did not intend. Therefore it makes no difference, so far as the question here involved is concerned, whether or not the Metcalf assignment and the Dakota mortgages were a part of the same transaction with the assignment to Campbell. Assuming that they were, and that all, taken together, constitute a general assignment wherein the assignors attempted to evade the statute, still the Campbell branch of the transaction, the validity of which is the only question before us, should be sustained.

6. The much-abused principle that a deed which is partly void as against the provisions of a statute, or as against the common law, is void altogether, has no application to the case at bar. This transaction, if it could be considered a general assignment, would not be in conflict with either the statute or the common law. The statute would simply operate to annul the preferences, allowing the assignment to stand, while the common law would sustain both the preferences and the assignment. On the misapplication and also the true use of the maxim, "void in part, void *in toto*," see *Curtis et al. v. Leavitt*, 15 N. Y. (Ct. Ap.) 123, 124, and cases cited; *Savage v. Burnham*, 17 N. Y. (Ct. Ap.) 576. It must be remembered always that the deed to Campbell, considered by itself, is not challenged on the ground that there was any fraud in fact connected with its execution; moreover, that it is admitted that the assignment to Metcalf paid or secured a *bona fide* indebtedness of the partnership, and that the Deadwood mortgages secured claims existing against the firm, in favor of the creditors named therein.

7. One question yet remains to be considered. The list of creditors mentioned in the schedule filed for record after this suit was brought contains, among other names, that of a firm known as Jensen & Johnson. The Jensen there referred to is admitted to be one of the partners in the partnership making the assignment under consideration. Counsel contend that this fact invalidates the assignment in law, since one of the assignors is a beneficiary, and will receive a small part of the proceeds from the sale of the assigned estate. Their position is, we think, untenable. Section 1520, Gen. Stats., upon which this objection is based, reads as follows:

"All deeds of gift, all conveyances and transfers or assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person

making the same, shall be void as against the creditors existing of such person."

The intent with which the transaction is had governs the application of this provision. Similar statutes have been held to include only those cases where the use or the trust for the benefit of the grantor was the principal purpose accomplished by the conveyance, but where such benefit was merely an incident, the main purpose and effect of the instrument being lawful, the application of the statute, save possibly as to such incidental use or benefit, has been denied.

In *Curtis v. Leavitt*, *supra*, at pages 122 and 123, it is said:

"All reasoning and all authority, as we have seen, concur in the conclusion that it [the statute of personal uses] has no application to cases of real and actual alienation upon valuable consideration, and for active and real purposes, although incidental benefits are reserved to the grantor. * * * This statute, then, only avoids conveyances, etc., which are *wholly* to the use of the grantor. If we came to a different conclusion, if we held that it applied to transfers made for other objects, but containing a residuary interest or partial use for the debtor, then the question would arise whether the whole is void or only so much of the grant as is not sustained by the valid purpose for which it was made. On this point I should come to the conclusion that the statute does not subvert all instruments in which any inoperative trust is expressed along with others that are good, but leaves those which are good and valid to stand."

And, among the propositions adopted by the court, on page 295 is the following:

"It being the opinion of the court that the statute applies only to conveyances, etc., primarily for the use of the grantor, and not to instruments for other and active purposes where the reservations to the grantor are inci-

dental and partial." See, also, *Morgan v. Bogue*, 7 Neb. 429; *Shoemaker v. Hastings*, 61 How. Pr. 97.

In determining the question before us, the character of the use intended by the deed is likewise an important consideration. It is extremely doubtful if Jensen individually would realize any material benefit by the payment of the claim of Jensen & Johnson; for his interest in the sum thus received would, of course, be liable for the debts of that partnership, while it is not beyond the reach of the creditors of Jensen, Bliss & Co. after they have exhausted the property of the latter firm. See *Fanshawe v. Lane*, 16 Abb. Pr. 71; *Welsh v. Britton*, 55 Tex. 118.

8. Under the foregoing views the operation of the assignment statute considered was confined to a narrow field. As now construed, it permitted the debtor to choose between a general and a partial assignment, and its only effect was to require that if he elected to make the former, and thus deprived his unpreferred creditors of recourse against his property, and divested himself of all control over his entire estate, so that he could not personally superintend the payment of his debts therefrom, such estate should be divided *pro rata* among his creditors. But we are satisfied, not only that this interpretation of the statute is in harmony with the language used, and supported by authority, but also that it may be in accord with the better reason and the sounder policy. Experience demonstrates the extreme danger of interfering by legislation with the debtor's *jus disponendi*, so long as he retains dominion over his property. Even a careful and skilful attempt by statute to fully guard all the equitable rights of creditors might result in untold disaster to the business world. Accordingly legislative bodies, our own included, have exercised extreme caution in dealing with the subject of assignments, and have left untouched many of the principles relating thereto which prevail at common law.

Our assumption, in the opinion filed, that the statute inhibited partial assignments for the benefit of creditors, was broader than its provisions justified, and led to a conclusion which, as already suggested, we now consider erroneous.

The judgment will be reversed and the cause remanded.

SPRUANCE, AUDITOR, EX REL. THOMAS, V. FARMERS' AND MERCHANTS' INSURANCE CO.

1. The insurance statute of Colorado contains no provision requiring mutual assurance associations to have or to accumulate a capital or reserved fund, beyond the amount necessary to defray current losses and expenses. Nor does it specify any particular method by which such companies shall make contracts and take risks. This subject is left to be determined by the association itself; the only limitation being that the plan chosen must include the principle of mutuality.
2. The principle of mutuality exists when the persons constituting the company contribute either cash or assessable premium notes, or both, as the plan of transacting business may provide, to a common fund, out of which each is entitled to indemnity in case of loss. It is perfectly consistent with this principle to transact business upon the plan of full paid cash premiums.
3. But the superintendent of insurance has almost unlimited power in the investigation of the affairs and management of these companies.

ORIGINAL agreed case.

In the year 1883 the Farmers' and Merchants' Insurance Company was duly organized as a mutual fire insurance association under the following section of our insurance statute:

"The provisions of this act shall not be construed to prevent any number of persons, not less than twenty, from associating together for the purpose of forming an incorporated company for the purpose of mutual insurance of the property of its members. When persons so

associated shall have complied with the provisions of this act, so far as [they] are applicable to such mutual companies, the superintendent of insurance shall commission the persons named in the certificate of incorporation, or a majority of them, to open books, to receive propositions and enter into agreements in manner hereinafter specified. But no company so organized shall commence business until *bona fide* agreements have been entered into for insurance with at least one hundred individuals, covering property to be insured to the amount of not less than \$50,000."

The association commenced the transaction of business, using both the assessment and cash plans for the payment of premiums for insurance. In the year 1884 the superintendent of insurance, on examination, discovered that the company was in an insolvent condition, the receipts having been absorbed by the management, so that nothing remained with which to pay losses; nor was indemnity against loss in any manner provided.

Upon a reorganization of the company, the following resolutions were adopted by the policy-holders as embodying the plan upon which the business should be transacted:

"Resolved, that, for the purpose of equitably and mutually indemnifying each other, and that each member shall be required to do and perform his part, to the end that all may be equally and mutually benefited, each member shall pay in as premium at a ratable percentage on the amount of insurance obtained by each, varied as the risks may vary in hazard, based upon the maximum cost of insurance, and such percentage of rates to be established and designated by the manager and secretary of this association on the foregoing basis; and that each policy-holder, upon becoming a member, be required to pay in such stated sum upon insurance received in cash, note or notes for the amount, to be paid within a reasonable time, subject to all the conditions, rules and regulations

adopted by the company: provided, that the amount so received shall be in full of all individual liability upon the part of each member.

“Resolved, further, that, should the aggregate amount of percentage deposited by each member and all of the policy-holders amount to a greater sum than may be necessary to pay all expenses and losses from time to time, and to pay all accruing losses and expenses upon all unexpired risks, that such unneeded surplus on hand shall from time to time be, by the board of directors, equitably and mutually distributed among the policy-holders at the time of such distribution in proportion to their respective ratable interests in such surplus.

“Be it further resolved, that the board of directors be, and are hereby, requested to so alter or modify the existing by-laws as to conform them to the manner of conducting the business of the company as in these resolutions expressed.”

At the commencement of this action the association had upwards of two thousand members, who became such, under these resolutions, by paying cash premiums in full of their insurance, and in full of all liability. The proceeding in this court is in pursuance of the statute providing for agreed cases. It is conceded in the agreed statement that the affairs of the company, since its reorganization, have been ably managed, and that it is now in a condition perfectly satisfactory to the superintendent of insurance. The object of the parties in instituting the proceeding is to determine whether, under the laws of Colorado, an insurance company, the membership of which consists of the policy-holders, can do business upon the plan provided in the foregoing resolutions.

Attorney-General THEO. H. THOMAS, THORNTON H. THOMAS, of counsel, for plaintiff.

Mr. B. F. MONTGOMERY, for defendant.

HELM, J. The purpose of the legislature in providing for the organization and maintenance of a state insurance department was to protect the interests of the large number of persons within the state who patronize corporations engaged in the business of insurance. Both joint-stock companies and mutual associations are recognized. As to the former, the object of the statute is accomplished in two ways: *First*, through the supervision and authority therein conferred upon the superintendent of insurance; and, *second*, by the provisions making an actual paid-up cash capital of at least \$200,000 a prerequisite to the transaction of business, and carefully guarding the investment or loan thereof. The statutory requirements relating to such paid-up cash capital do not apply to mutual associations. Neither are there any corresponding sections providing for a reserve fund in connection with the latter class of companies. It is the customary, if not the universal, rule elsewhere to specify in statutes authorizing the organization of mutual associations the leading features of a plan upon which they shall take risks and conduct business. This plan generally includes specifications relating to a capital or reserve fund, either in the hands of the members and represented in the treasury by assessable premium notes, or in the hands of designated officers. The statute before us, however, is surprisingly deficient in this particular. The only section thereof referring by name to mutual companies organized after its passage contains a statement showing that the legislature intended to make such provision, at least so far as to specify the manner of entering into agreements; but either by reason of inadvertence, or a subsequent change of purpose, this subject was left wholly uncovered.

Since the method of taking risks in the mutual association is not declared by statute, and since it is not required to be stated in the articles of incorporation, its selection is left to the company itself; and the only lim-

itation affecting the plan which may thus be chosen is that it shall include the principle of mutuality. We need hardly suggest that an association which did not embrace the foregoing principle would not be a "mutual" company within the meaning of the statute. An important inquiry at this juncture, therefore, is, what are the essential elements involved in the recognition of this principle? We answer that the principle of mutuality exists when the persons constituting the company contribute either cash or assessable premium notes, or both, as the plan of transacting business may provide, to a common fund, out of which each is entitled to indemnity in case of loss. *Union Ins. Co. v. Hoge*, 21 How. 35; *Mygatt v. New York Protection Co.* 21 N. Y. 52; *Ohio M. Ins. Co. v. Marietta Woolen Factory*, 3 Ohio St. 348; *White v. Haight*, 16 N. Y. 310; May, Ins. § 548, citing three of the foregoing cases; Ang. Ins. § 413.

Persons so associated are said to be members of the company. They have, or may have, a voice in the management of its affairs and are practically both insurers and insured. All are interested in what may be termed the profits and losses of the association; for if the assessable note system in any of its forms be adopted, the demands upon each member to meet assessments, during the life of his policy or risk, are large or small, according to the multiplication or diminution of losses; while, if a cash premium plan prevail, each member has an interest in the surplus premium fund remaining after payment of losses and expenses; and, of course, the amount of such surplus is governed by the extent of the losses suffered. The policy-holder in the joint-stock company is not thus situated. He pays a certain definite sum as premium, and the company agrees therefor to pay him a certain specific amount in case of loss. He has no voice whatever in the management of the business, and whether the profits or losses are large or small does not concern him, provided the company remains able to liqui-

date any losses contemplated by his contract. See authorities cited *supra*. The principle of mutuality has probably been more often recognized and enforced in these associations through the assessable note system in some of its numerous forms; but, as shown by the foregoing suggestions and authorities, it is perfectly consistent with the payment of cash premiums. The latter method of making contracts and taking risks has been and is extensively recognized in the United States; and sometimes the same mutual company is authorized by statute to invoke both methods in the transaction of its business. "The present tendency is to pay the entire amount (of premiums) in cash." Bliss on Life Ins. § 427. A different position concerning the consistency with the mutual principle of doing business upon a purely cash basis seems to be announced in *Illinois Fire Ins. Co. v. Stanton*, 57 Ill. 354. But, with all due respect to the able court promulgating that opinion, we think that the view above taken is supported by the weight of authority and also by the better reason.

The conclusion seems to be inevitable, that, as the law now stands, mutual associations, organized under section 1704 of the General Statutes, may do business upon a cash premium plan. The objections of the attorney-general are not without force, but, in view of the circumstances, we do not deem them controlling. It is true that premium notes represent a reserve fund in the hands of the members; and that, under this method of doing business, there is therefore a kind of capital as security against losses. It is also substantially true that when the premiums are paid in cash there is not, in the absence of legislation, necessarily any such fund or indemnity; a majority of the members or a majority of the directors may do with the surplus of such premiums, remaining after the payment of current losses and expenses, as they shall deem advisable. They may from time to time return the same to the members, or jeopardize its loss through unwise loans.

and investments. It would be more in harmony with the spirit of the act to suppose that the legislature intended mutual companies to have some sort of a reserve fund at the date of the organization, or thereafter to accumulate the same. But, as already suggested, this purpose may be, and usually is, effectuated under both methods of making contracts. Therefore, supposing the legislature intended to require that mutual companies do business upon one only of the foregoing general plans, how shall we determine which of the two would have been selected? The act itself contains nothing that points with reasonable certainty to either as being the exclusive choice. Our opinion in the matter might not correspond with the legislative judgment, and our selection might represent the converse of the legislative intent. Besides, our action, in such case, would savor more strongly of judicial legislation than of judicial interpretation. It would be supplying something which the legislature, whatever may have been its purpose, did not include in the act. Nor do we feel at liberty to hold that the superintendent of insurance is clothed with authority to supply the missing statutory provision. To say that he may prescribe the plan upon which mutual insurance risks shall be taken would be to authorize what might appropriately be termed executive legislation; for, though clothed with a sort of judicial power, he is essentially an executive officer.

But while mutual associations organized to insure against loss of property are not required by the law to have, or to accumulate, a reserve fund beyond the amount reasonably necessary to meet current losses and expenses, in order to do business within the state, they are subject to all provisions of the act that may be found "applicable." They must make annual reports to the superintendent of insurance, showing their assets, liabilities, moneys received and expended, character of business, etc. The superintendent of insurance has almost unlimited power

in the investigation of their affairs and management. Until they have complied with the law, he should refuse permission to transact business; and the privilege being granted, if they disobey the law, or become financially unsound, he must revoke the same. In passing upon such financial condition, the superintendent will take into consideration all appropriate *data*,—such, for instance, as the amount of cash received, and the balance on hand; the manner of loaning or investing surplus premiums, having reference to section 1695, Gen. Stats., the first part of which, at least, is applicable; the extent of the business transacted, including the number and character of risks taken; the running expenses; probable losses upon unexpired risks, as well as losses accrued, etc.

It is, of course, true that the protection thus given the assured is not so complete as that provided in the case of joint-stock companies; but it is likewise true that if the officer mentioned performs his duty in the premises, no great hardship or injury is likely to result prior to the next session of the legislature. Then the omission, if unintentional, may be rectified by that branch of the government in which is lodged the power of enacting laws.

The question propounded by the parties is answered, and judgment will be entered accordingly.

THE PEOPLE EX REL. SEELEY V. MAY, TREASURER, ET AL.

1. Whether a court is considering an agreement between parties, a statute or a constitution, with a view to its interpretation, that which the court seeks is the thought which the instrument expresses. To ascertain this the first resort in all cases is to the natural signification of the words employed in the order of grammatical arrangement in which the framers of the instrument have placed them.
2. Seeking the meaning of section 6, article XI, of the state constitution, from the words there used, and giving these words their plain

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15	425
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17	215
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18	200
1a	387
9	80
20	88
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2a	541
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24	129
9	80
e32	233
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20a	551
9	80
38	37

and ordinary signification, it is a fair analysis of the section to say that it consists of two leading declarations of legislative will, with exceptions to each: "That no county shall contract any debt by loan in any form," except, etc.; "that the aggregate amount of indebtedness of any county, for all purposes, exclusive of debts contracted before the adoption of the constitution, shall not exceed at any time" a certain rate, except, etc. While these two propositions are associated, they are none the less independent declarations.

3. Having fixed a lawful margin of indebtedness, the intention of the framers of the constitution was that the annual county tax should meet the annual county expenditure.
4. Where no ambiguity or doubt appears in the law, the court should confine its attention to the law, and not allow extrinsic circumstances to introduce a difficulty where the language is plain. Contemporary construction can never abrogate the text, fritter away its obvious sense, narrow down its true limitations, nor enlarge its natural boundaries.
5. Antecedent mischief is not essential to support a constitutional limitation, or an intent to limit. The multitudinous restraints of all constitutions proceed largely against possible mischiefs.
6. This court will take judicial notice of the proceedings of the constitutional convention recorded in their journals and deposited in the archives of the department of state by order of the convention.
7. While the ultimate inquiry is always the intent of the people who adopted the constitution, the intention of its framers is an associated inquiry.
8. Under the constitution the limitation of debts being applicable to all debts, irrespective of their form, it follows that in determining the amount of county indebtedness at any time, county warrants are to be taken into the account, and any warrant which increases the indebtedness over and beyond the limit fixed is in violation of the constitutional provision, and void.
9. County authorities, as well as parties dealing with them, must take notice of the limit which the people in their constitution have prescribed for county indebtedness. No plea of ignorance or hardship can be allowed to prevail.

THIS was an original action in the supreme court, asking for *mandamus* on defendant, treasurer of Lake county, to accept and receive a county warrant issued prior to July, 1885, in payment of county taxes. To the complaint defendant demurred, and, on argument, the court held that county warrants were, in so far, contracts

of the county, that when a law, in force at the time of their issuance, provided that such warrants should be received in payment of county and road taxes, a subsequent act, providing that all such taxes should be paid in cash only, was unconstitutional as to warrants issued prior thereto; that the effect of the law as to such warrants was to impair the obligation of the contract. *The People ex rel. v. Hall*, December Term, 1885. On overruling the demurrer defendant asked and obtained leave to answer.

The answer denies:

1. "That the relator was the legal holder of the certain county warrant or order of said alleged county of Lake, No. 12,119, mentioned and described in said petition and alternative writ, as alleged therein."

"That the said warrant or order was, on the 9th day of May, A. D. 1884, or at any other time before or since, for value received or otherwise, sold, assigned, transferred or delivered to the said petitioner, and denies that the said petitioner was or is the owner of said county warrant or order, or entitled to receive payment therefor from the county treasurer of said county of Lake."

2. And for a second and separate defense to this action and the matters and things alleged and set forth in the said relator's petition and the alternative *mandamus* herein, the said defendant and respondent further answering alleges that said supposed and alleged county warrant or order No. 12,119, issued to William L. Ledford for \$15.40, mentioned and set forth in the said relator's petition and the alternative *mandamus* herein, was made and issued or attempted to be made and issued, and the debt and obligation thereof assumed to be contracted, or attempted to be contracted, by the said county of Lake in direct violation and contravention of the provisions of section six (6) of article eleven (11) of the constitution of the state of Colorado in such case made and provided, and at a time, to wit, the fifth (5th) day of

July, A. D. 1883, when the limitation of the aggregate amount of debt or indebtedness which could lawfully be contracted or incurred by the said county of Lake for all purposes as prescribed by said constitutional provision, had been reached and exceeded by said county, and in this, to wit:

First. That at said time the total valuation of the taxable real and personal property of said county of Lake was not less than one million dollars (\$1,000,000), and in fact and truth, at such time such valuation, as assessed in pursuance of the laws of the state of Colorado, amounted to the sum of, to wit, four millions two hundred and forty-one thousand five hundred and thirty-five dollars (\$4,241,535).

Second. That at said time the aggregate amount of the indebtedness of said county of Lake, for all purposes, exclusive of debts contracted before the adoption of the constitution of the state of Colorado, exceeded the sum of fifty thousand eight hundred and ninety-eight dollars (\$50,898), and, in fact, exceeded the sum of one hundred thousand dollars (\$100,000), and that at such time said indebtedness exceeded twice the rate upon the whole valuation of the taxable property, real and personal, of said county of Lake, as specified in and by said constitutional provision, by reason of all which the said county warrant or order is of no validity, force or effect whatever against said county of Lake, and ought not to be received for or in payment of the taxes in said petition and alternative writ of *mandamus* mentioned and alleged.

Messrs. TELLER and ORAHOOD and Messrs. MARKHAM and DILLON, for relator.

Mr. DANIEL E. PARKS and Mr. H. B. JOHNSON, for respondent.

ELBERT, J. We treat the first defense to the answer as amounting to a traverse of the allegations of the complaint and do not notice it further.

The principal contention is over the second defense interposed.

Its sufficiency is submitted on demurrer, and its determination requires the construction of section 6, article XI, of the constitution.

The section is as follows: "No county shall contract any debt by loan in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges; and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county, following, to wit: Counties in which the assessed valuation of taxable property shall exceed \$5,000,000, \$1.50 on each \$1,000 thereof. Counties in which such valuation shall be less than \$5,000,000, \$3 on each \$1,000 thereof. And the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned; *provided*, that this action shall not apply to counties having a valuation of less than \$1,000,000."

Upon its face this looks like a plain limitation of the aggregate amount of county indebtedness, irrespective of its form.

It is contended, however, with great earnestness and ability, that it is to be regarded only as a limitation of county indebtedness "by loan." The leading considera-

tions urged in this behalf we will notice in their proper place as we proceed.

The large interests indirectly involved, upon the one hand, and the importance of preserving inviolate constitutional limitations, upon the other, demand a careful consideration of the question raised.

Rules of construction have for their object the discovery of the true intent and meaning of the instrument to be construed. If applicable, they are supposed to lead to the truth; if not applicable, and are, notwithstanding, applied, they lead astray. If we reject any of the many rules appealed to in this discussion, it is not because they are unsound, but inapplicable. We place at the beginning of the inquiry a few familiar propositions, which, taken together, constitute what we regard as the leading and controlling rule which is to guide us in this case.

“Whether we are considering an agreement between parties, a statute or a constitution, with a view to its interpretation, the thing which we are to seek is *the thought which it expresses*. To ascertain this the first resort in all cases is to the natural signification of the words employed in the order of grammatical arrangement in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning which involves no absurdity and no contradiction between different parts of the same writing, then that meaning, apparent on the face of the instrument, is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument, and neither courts nor legislatures have a right to add to or take away from that meaning.” Cooley’s Constitutional Limitations, 69, 70.

The article in which the section occurs is entitled “Public Indebtedness,” and the section opens with a general and leading declaration that “no county shall contract any debt by loan in any form.” From this general pro-

hibition, however, the section excepts loans "for the purpose of erecting necessary public buildings, making or repairing public roads and bridges; and such indebtedness, contracted in any one year," is limited by specified rates on the assessed valuation of taxable property. Having prohibited indebtedness "by loan" and provided for the exceptions named, the section follows with another and second general declaration, to wit: "The aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above herein limited." To this general declaration there is also an exception, namely, when "the question of incurring such debt shall at a general election be submitted" to the qualified tax-paying electors of the county; and this power to vote an indebtedness is likewise limited by a fixed rate on the assessed valuation of taxable property.

There is a provision that bonds, if any be issued, shall not run less than ten years. There is also a provision that the section shall not apply to counties having a valuation of less than one million of dollars.

We construe the section without reference to these last two provisions. If there be anything in their language hostile to the construction given to the rest of the section, it is not apparent. Seeking the meaning of the framers of the constitution from the words they have used, and giving these words their plain and ordinary signification, it is a fair analysis of the section to say that it consists of two leading declarations of legislative will with exceptions to each:

(1) "That no county shall contract any debt by loan in any form," with the exceptions named.

(2) "That the aggregate amount of indebtedness of any county, for all purposes, exclusive of debts contracted before the adoption of the constitution, shall not

exceed at any time" a certain rate, with an exception named.

While these two propositions are associated, they are none the less independent declarations. Independent for the plain reason that there are no words giving to either clause the character of a dependent or qualifying clause. This stands confessed, when we are asked to supply a word giving to the latter clause the character of a qualifying sentence. True, we find the words "shall not at any time exceed twice the amount above herein limited." But these are words of reference for the purpose of adopting a rate of limitation; they in no wise qualify the language descriptive of the *thing* limited.

The language used by the framers of the constitution expresses the meaning we have assigned it adequately, and with such precision as, in our opinion, leaves no room for reasonable doubt.

The construction given is based on the plain terms of the section. Corroborative of this construction are some extrinsic facts worthy of notice. Prior to the year 1876, when our constitutional convention was in session, a provision limiting the aggregate amount of county indebtedness for all purposes, irrespective of its form, had become in the later constitutions a *customary* provision. County indebtedness was limited by the constitution of Iowa (article 11, section 3), adopted in 1857; of Illinois (article 9, section 12), adopted in 1870; of West Virginia (article 10, section 8), adopted in 1872; of Pennsylvania (article 7, section 8), adopted in 1873; of Wisconsin (article 11, section 3), adopted in 1874; of Missouri (article 10, section 12), adopted in 1875.

We proceed safely, when we assume that the members of the convention, as intelligent men, took the constitutions of other states as their guides in their work, and more especially the later constitutions, embodying, as they did, provisions based on nearly a century of experience.

The omission from the constitution which they framed of a provision limiting county indebtedness would be more noticeable than its presence. This the more clearly appears, when we ascertain the fact that the members of the convention were very largely occupied with the question of the *honest* and *economical* administration of public affairs. In an address to the people, issued by the convention upon its adjournment, they make prominent the many provisions of the constitution against extravagance in the different departments of the government: In the executive department; in the legislative department; and in the matter of public indebtedness.

This address is an authentic memorial of the time, and its value consists, in this case, not only in the general light it sheds upon the situation, the direction of the efforts of the members of the convention, and the mischiefs guarded against, but in the mention made of the section which we are considering, and the "article" in which it occurs.

They say, "By the provisions of this article, we have prohibited the legislature from lending the credit of the state in aid of any corporation either by loan or by becoming a subscriber to any stock or a joint owner with any party, except in case of forfeiture and escheat, also from assuming any debts or liability of any party, and have also required appropriations to be kept within the limits of our resources, and that no appropriations be made unless assessments are also made sufficient to meet them, and at the same session of the legislature. The same principles are applied to counties, cities, towns and school districts as far as applicable, with an additional safeguard that to increase the indebtedness in excess of the rates fixed in this constitution, a vote of the people must be had thereon. In limiting the amount of indebtedness which may be contracted by counties, we have endeavored to make a classification that would not cripple counties having smaller resources and at the same time

restricting those of larger resources to prevent extravagance."

Attention is here called to county indebtedness in language which points to a general limitation of all county indebtedness, irrespective of its form. Nothing is said of indebtedness "by loan." On the other hand, the language is in accord with the language used in the section. It also discloses the legislative motives. The language is: "We have endeavored to make a classification that would not cripple counties having smaller resources and at the same time restricting those of larger resources to prevent extravagance." Associated with the intention to prevent extravagance is the desire not to cripple counties having "smaller resources." Hence, first the limitation and then the classification upon the basis of taxable valuation and the proviso "that this section shall not apply to counties having a valuation of less than one million of dollars."

We do not care to assign to the language we have quoted any undue value as a specific interpretation of the clause in controversy. The language may not have been used with care and precision. The presumption that it was so used, however, is strengthened by the fact that the address was first prepared by a committee, among whom were able lawyers and jurists, and afterwards submitted to, considered and adopted by the convention. It has the rank and character of a state paper issued to the people by their chosen representatives in convention assembled at a most important period in their history and upon questions of the first magnitude. Whatever its force, it supports the construction given. What we submit as unquestionable is this: that it discloses clearly an intention upon the part of the framers of the constitution to guard against extravagance in the matter of county indebtedness.

It is worthy of note, in this connection, that in many, if not all, of the states named, the constitutional provis-

ion limiting the aggregate amount of county indebtedness has been questioned upon like ground that it was intended to apply only to bonded indebtedness, and that the decisions have uniformly been adverse to the construction claimed. *City v. Stewart*, 51 Iowa, 385, and cases there cited; *Law v. The People*, 87 Ill. 385; *Prince v. The City*, 105 Ill. 138; *Appeal of the City of Erie*, 91 Pa. 398; *Wisconsin, etc. v. Taylor*, 52 Wis. 37.

Many objections are urged by counsel for relator to this construction.

It is claimed that there is an important difference between this section of our constitution limiting county indebtedness and the sections having a like object in the constitutions of the other states. That the words "by loan" are peculiar to the provision of our constitution and show a different intent. In this behalf it is said that "section 6 must be interpreted as though the word 'such' had been inserted between the words 'all' and 'purposes' in the tenth line of the section," so as to read "and the aggregate amount of indebtedness of any county for all *such* purposes, exclusive of debts," etc. To this end the argument is largely directed, and it is plain to see that if this insertion of a word be admissible, the section must be held to apply only to debts "by loan." And it is equally plain to see that in order to so limit it, the word "such" or some equivalent word must be inserted in the line named.

Assuming, for the time and for the purposes of this inquiry, that the addition of a word to a section of the constitution, as contended for, is within the limits of judicial power and discretion, we examine some of the considerations urged that to do this is to declare and follow the real intention of the framers of the constitution.

(1) We are told that otherwise the construction leads to an absurdity, in this, that the rate fixed is so low that county officials would be seriously embarrassed and crip-

pled in the management of county affairs and unable to provide for the ordinary expenses of the county.

It is a full answer to this to say that this is a limit of indebtedness and not a limitation of the amount that may be raised by taxation to meet the necessary current expenses of the county. It is simply a declaration that the county, within certain limits, shall live within its income, and not that its income shall be more or less. The limit of indebtedness fixed was a matter of judgment about which men might differ, and it is not for us to substitute our judgment for that of the convention.

Having fixed a lawful margin of indebtedness, the intention was that the annual county tax should meet the annual county expenditure. The general assembly, under its constitutional power (section 7, article X), has vested in the county authorities the power to assess and collect taxes for all county purposes, namely: "for interest and payment on county bonds, such rate as may be necessary to pay said interest and payments; for ordinary county revenue, including support of the poor, not more than ten mills on the dollar; for the support of schools, not less than two mills nor more than five mills on the dollar; for road purposes not more than five mills on the dollar; and a poll tax not exceeding \$1 for such purposes as may be determined by the county commissioners of each county." Here is a legislative limitation on taxation for county purposes. The maximum rate is fixed. Beyond the limit the county commissioners cannot go. If this limit of taxation is so low as to cripple any county in the management of its county affairs, it is entirely within the discretion of the legislature to raise it. With this power to levy and collect taxes to meet the expenditure of a county during any fiscal year, we do not see how it can be said that a limitation on their power to contract indebtedness can in any wise cripple them in the management of their county affairs. Some

counties in the state have admittedly lived within the constitutional limitation; why have not all? Those which have lived within the limit, to that extent prove its practicability. That it has been impracticable in any county does not affirmatively appear.

(2) It is further urged that in the other sections of the article there is no limit fixed to state, city or town indebtedness except indebtedness "by loan." That the different sections are to be construed *in pari materia*.

We do not care to construe these sections in any final manner in advance of cases presented under them and in the absence of full arguments respecting the effect of their provisions. It may be permitted us, however, to say that the correctness of the position taken is open to very grave doubt, if reference be had to other provisions of the constitution. By section 11, article X, taxation is limited to a certain rate. By section 16 of the same article, expenditure is limited to the taxes raised. Taking the provisions of the two sections together, the intention would seem to be that the annual state tax should meet the annual state expenditure. Construing these two sections in connection with section 3, article XI, it would appear that no state indebtedness was contemplated except such as might be incurred under the provisions of section 3. The difference lies in this, that a stricter rule is applied to the state than to the county. With regard to city or town indebtedness, it will be observed that section 8 of the article, after providing for indebtedness "by loan," declares that "the aggregate amount of debt so created, together with the debt existing at the time of such election, shall not at any time exceed three per cent. of the valuation aforesaid." If this is not a limitation of town and city indebtedness in all forms, it is upon the assumption that the *existing indebtedness* referred to is indebtedness "by loan," a position, at best, very doubtful.

But if it be true that there is no limitation of the aggregate amount of indebtedness for all purposes that the

state may contract or that a city or town may contract, it would by no means follow that a plain limitation of the aggregate amount of indebtedness which a county could contract is to be disregarded.

(3) A contemporaneous interpretation of this section by the first legislature after the adoption of the constitution is claimed. A subsequent practical construction of the section in some counties by the officers having to do with the law is also urged upon our notice. As to the first, we do not find in the statute referred to, the legislative interpretation contended for. As to the second, the practical construction by county authorities claimed has by no means been universal. We cannot confine construction to cases where the provision has been violated. A large majority of counties, as far as we are advised, have kept within the limit. Upon what grounds are we to say that the construction in such counties has been the same and not the reverse of that claimed? In cases of doubt, such interpretation has its place and weight. In the case of *The People v. Wright*, 6 Colo. 92, contemporaneous interpretation was allowed weight respecting a point upon which the amendment construed was *silent*. "Where, however, no ambiguity or doubt appears in the law, * * * the court should confine its attention to the law, and not allow extrinsic circumstances to introduce a difficulty where the language is plain. To allow force to a practical construction in such a case would be to suffer manifest perversions to defeat the evident purpose of the law-makers." Cooley's Const. Lim. 84. "Contemporary construction can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries." Story on the Const. sec. 407.

And here we desire to say that we are unable to see how county authorities, having to deal with this provision, gave it any such construction as is contended for

without the gravest doubts as to its validity. We think we keep closer to the fact to suppose that they acted without their attention being called to the provision, than to suppose that they misunderstood its plain requirements.

(4) It is claimed that the evils to be reached must be considered, and must be taken as guides to find the legislative intention, and we are asked to take judicial notice of the fact that, prior to the adoption of the constitution, bonded indebtedness in many forms and for many purposes existed as burdens upon cities, towns and counties of the then territory. That indebtedness in this form was the evil aimed at by this section; that prior to the adoption of the constitution the power of county commissioners in the matter of incurring indebtedness in the management of county affairs were practically unlimited, save by their "wisdom and discretion." And, in this connection, it is confidently asserted "that in 1876, before or at the time of the adoption of the constitution, and for some years thereafter, there was no complaint of burdens imposed by counties or towns for indebtedness contracted other than those imposed by bonds and for debts contracted and evidenced by such bonds."

The conclusion we are asked to draw from this is that the intention, therefore, could only have been to limit indebtedness "by loan," as it was the only evil complained of.

We are not prepared to say that prior to the adoption of the constitution there had been no extravagance in the management of county affairs, or that there had been no improvidence in the matter of incurring county indebtedness in the nature of a floating debt. On the other hand, we think if the issue were submitted to a jury they might in all probability find the fact otherwise.

But, if we concede the fact as claimed, the conclusion drawn by no means follows.

It will not do to say that an actual existing, antecedent mischief is essential to support a constitutional limitation, or an intent to limit; or that the absence of such an actual mischief excludes an intention to limit. On the other hand, it is safe to say that, wherever there is a power liable to be abused there is to be found a legislative motive for restraint. The multitudinous restraints of all constitutions proceed largely against possible mischiefs. To leave powers unlimited where there is great temptation to abuse is to invite abuse. The members of the convention were charged with the important duty of framing the fundamental law of the new state. It was a grave responsibility. They were gentlemen of standing, character and ability, and many of them experienced in the administration of state and county affairs. It was their duty not only to provide against the recurrence of evils, patent and already experienced, but also to guard every point where abuses were liable to creep into the administration of public affairs.

The waste, extravagance, frauds, peculations, defalcations and tax burdens disgracing and incumbering the administration of American municipalities, county, town and city, had long been national topics of discussion, written about by publicists, denounced by the press and resolved about by political parties, and were known to the country at large. The effect of this was to make the honest and economical administration of affairs, whether town, city, county or state, practically the most important question that came before the convention. To say that the framers of the constitution saw no danger save in "bonded indebtedness" is to credit them with a very limited statesmanship, and to say that they trusted to "wisdom and discretion" as restraints is to impute to them a very sanguine statesmanship. It did not require much wisdom to see that to leave the powers of the county commissioners to contract indebtedness unrestrained, save by the old rule of "wisdom and dis-

cretion," was, at best, to leave security in this behalf a matter of chance, dependent on the vicissitudes of nominating conventions and partisan elections. Nor are we to suppose that they dealt with the important question of public indebtedness other than in a practical manner; that they made an unsubstantial distinction and limited the *form*, and not the *amount*, of indebtedness. The indebtedness was the essential thing. The mischief would be the same, and the burden the same, whether the debt was "by loan" evidenced by bonds, or a floating debt evidenced by warrants. If forbidden one guise, it was easy for extravagance to assume the other, and county indebtedness would remain practically unrestricted.

All this is upon a concession of the assertion that no abuse existed in the administration of county affairs in the then territory, except in the matter of bonded debt. We have endeavored to make it plain that, admitting the fact, no trustworthy or exclusive presumption, such as is contended for, arises respecting the intention of the framers of the constitution. Certainly none that would authorize us to interpolate into the section a word which changes its meaning radically, and from a meaning not "absurd and monstrous," but entirely admissible, and in accord with the provisions of the constitutions of other states.

We have thus noticed the principal considerations which have been urged that the real and only intent of the framers of the constitution was to limit indebtedness "by loan," and that "section 6 must be interpreted as though the word 'such' had been inserted between the words 'all' and 'purposes,' in the tenth line of the section." We might, perhaps, have rightfully dismissed these objections by the application of the rule that "we are not to import difficulties into a constitution by the consideration of extrinsic facts when none appear upon

its face." We have, however, preferred to enter into their consideration, believing that an appeal to extrinsic facts would support the justice and correctness of the construction given. And this brings us to a consideration of the proceedings of the constitutional convention, recorded in their journal and on deposit in the archives of the department of state by order of the convention. Of these proceedings we take judicial notice. Cooley's Const. Lim. 80.

We have examined this journal, and have traced this article and section with great care from the time it was first reported by the committee on state, county and municipal indebtedness, on January 25, until its final passage. It was considered in the committee of the whole many times, and many times recommitted. It is unnecessary to notice the many changes which the section underwent.

It will be found that, under date of February 10, the word "such" was, on motion, inserted before the word "indebtedness," in the ninth line of the section (tenth line as published); that subsequently, and on the same day, the vote by which this amendment was made was reconsidered, and the word "such" omitted from the section as adopted by the convention on that day; that the article was then referred to the committee on revisions and adjustments; that subsequently, and on the 2d day of March, the above committee reported the section back to the convention with the word "such" again inserted before the word "indebtedness," in the ninth line; that the convention approved the section in this form; that the article was then recommitted to the committee on revisions for adjustment in the constitution; that subsequently, and on the 8th day of March, the convention instructed the committee on revisions and adjustments, by resolution, to strike out the word "such," "in the ninth line of section 6 of the article on state, county and

municipal indebtedness," and that this was the last and final amendment to section 6 prior to its adoption by the convention in its present form.

These several entries show that the attention of the convention was called to, and occupied with, the very limitation contended for by the relator; that they twice limited the section to indebtedness "by loan" by the insertion of the word "such," and twice, and finally, changed it back to a general limitation, applying to the aggregate amount of county indebtedness, for all purposes and in all forms.

We are not to presume that the framers of the constitution did not understand the force of language. This *action* of the convention shows conclusively an *intention*, shows conclusively that they intended that the section should stand, and be read, understood, and adopted by the people, as expressing a meaning different from the meaning which the word "such," inserted as indicated, would give to the section. Thus we see that this word, which we are asked to interpolate into the section, "is a stone which the builders rejected." We are not at liberty to restore it to, and make it the "head-stone" of, the section.

While the ultimate inquiry is always the intent of the people who adopted the constitution, the intention of its framers is an associated inquiry. The people are supposed to have accepted and ratified the instrument in that sense most obvious to the common understanding. Cooley's Const. Lim. 80.

The limitation being applicable to all debts, irrespective of their form, it follows that in determining the amount of county indebtedness at any time, county warrants are to be taken into the account, and any warrant which increases the indebtedness over and beyond the limit fixed is in violation of the constitutional provision, and void.

Whether the doctrine recognizing the right to antici-

pate, by assignment, revenue levied but uncollected, by warrants drawn thereon and accepted absolutely in payment, is admissible under our statutes, we do not now determine. The case, as it stands, does not present this question. *Law et al. v. The People*, 87 Ill. 385.

The hardships and inconveniences resulting from this construction are urged upon our attention. To such appeals the language of the courts is uniform. The province of the judiciary is not to make the law, but to construe it. The meaning of a constitutional provision being plain, it must stand, be recognized and obeyed as the supreme law of the land. "It is not for us, but for those who made the instrument, to supply its defects. If the legislature or the court may take that office upon themselves, or, under color of construction or upon any other specious ground, they may depart from that which is plainly declared, the people may well despair of ever being able to set any boundary to the powers of the government. Written constitutions will be worse than useless."

Nor is there any just force or propriety in the argument of repudiation.

The law is, and all persons are presumed to know it, that municipal bodies can only exercise such powers as are conferred upon them, * * * and all persons dealing with them must see that the body has power to perform the proposed act. *Law et al. v. The People*, 87 Ill. 394; *Litchfield v. Ballou*, 114 U. S. 190; *Dixon County v. Field*, 111 U. S. 83.

County authorities, as well as all parties dealing with them, must take notice of the limit which the people in their constitution have prescribed for county indebtedness. No plea of ignorance or hardship can be allowed to avail. To afford security the rule must be inexorable. If the argument of repudiation is to prevail, then every constitutional limitation against incurring indebtedness, whether state, county or city, "is a sounding

brass and a tinkling cymbal." Its violation in every instance would supply the reason for not enforcing it, because to enforce it would deprive parties of benefits arising from its violation, and this would be repudiation.

The defense interposed by the answer is good. The demurrer is overruled.

Demurrer overruled.

BOHM V. BOHM.

1. Under the statute (Gen. Stats. sec. 2174), bills for relief on the ground of fraud must be filed within three years after the discovery, by the aggrieved party, of the facts constituting such fraud, and not afterwards.
2. Where the defendant alleged in her cross-complaint that she did not discover the fraud upon which she sought relief until within three years of the filing of the cross-complaint, the allegation standing unimpeached, the original transaction being between a mother and her son, and under other circumstances stated in the cross-complaint, *held*, on demurrer, that the case made by the cross-complaint was not barred by the statute of limitations.
3. Under the statute of frauds of this state the same evidence is necessary as under the statute of 29 Car. II., c. 3, to establish a trust.
4. The general rule is that a promise by a grantee to hold the land for the grantor, or to reconvey it to him, is in effect a declaration of trust and directly within the mischief which the statute of frauds was intended to prevent. The mere circumstance that a confidence has been violated is not sufficient to exclude the operation of the statute.
5. To exclude the operation of the statute on the ground of fraud, where an oral agreement is alleged as a foundation of the trust, it must appear that the promise was used as a means of imposition or deceit, and if the case, taken as a whole, is one of fraud, the promise may be received in evidence as one of the steps by which the fraud was accomplished.
6. The settled doctrine is that the statute of frauds does not apply to such a case, since the trust arises out of the fraud, and is consequently excepted from the operation of the statute. The same rule applies where a person, occupying a fiduciary relation to the owner of real estate, takes advantage of the confidence reposed in him by virtue of such relation to acquire an absolute conveyance without

9	100
15	8
15	491
9	100
17	86
9	100
1a	110
2a	154
9	100
19	176
9	100
21	326
7a	383

consideration by verbal agreement, which he promises to reduce to writing.

7. Whenever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the party so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.

Appeal from Superior Court of the City of Denver.

THE plaintiff below, Mary Bohm, filed a complaint against the defendant, Magdalena Bohm, alleging the ownership and possession of plaintiff to twelve blocks of lots in Bohm's subdivision of the city of Denver. That she claimed title in fee thereto, but that said defendant claimed an estate or interest therein adverse to the title of the plaintiff. The complaint denies the validity of defendant's claim upon said premises, prays that she be required to set forth the nature of her claim, that plaintiff's title be adjudged valid, and that defendant be forever enjoined from asserting any claim of title to the said premises.

The answer and cross-complaint of Magdalena Bohm alleges ownership in fee by the defendant on the 4th day of January, 1878, of a tract of land embracing eighty acres, a parcel of which was and is the premises described and claimed by the plaintiff. That said tract of land was then incumbered by two deeds of trust executed to secure the aggregate sum of \$3,000 and interest; that defendant was then, as now, a widow; that she was without means to remove the said incumbrances, and was, at the date aforesaid, induced to execute to her son, Charles Bohm, a deed of the entire tract of land in fee, in consideration of his promises, upon which she relied and acted, that he would, upon execution and delivery to him of such conveyance, execute and deliver to said defendant a written

declaration of trust, to the effect that she held an undivided one-third interest in said entire tract of land, free and clear of all liens and incumbrances, and in the proceeds thereof in case of sale.

One of the foregoing allegations is in the words following: "And the said Charles Bohm then and there, in consideration of such conveyance to him, and for the purpose of obtaining the legal title to said tract of land from the defendant herein, agreed with and promised the defendant that he would, upon the execution and delivery to him of said conveyance, execute and reduce to writing a declaration of trust," etc., setting out the verbal agreement; that in consideration of the two-thirds of said tract vesting in said Charles Bohm absolutely, by said deed, he promised that he would assume, pay and remove all liens from the said tract of land, and that upon demand he would execute and deliver to the defendant said one-third interest in said tract of land, free and clear of all liens and incumbrances.

Then follows an averment that said Charles Bohm, on the 15th day of December, 1883, executed to the plaintiff, Mary Bohm, a deed of the land in the complaint described, and of blocks one (1), two (2), three (3), four (4) and five (5), in Bohm's subdivision of the city of Denver, which is the only conveyance under which the plaintiff claims.

Following this is an averment that at the time of this conveyance plaintiff was the wife of the said Charles Bohm; that the conveyance was without consideration, and that before and at the time of said conveyance the plaintiff knew of the terms, conditions and promises upon which the conveyance from defendant to Charles Bohm was made; consequently the plaintiff took the conveyance burdened with the trust.

Defendant alleges that Charles Bohm, intending to cheat and defraud her out of her interest in said land, failed and refused to execute the declaration of trust, although defendant frequently demanded that he execute

the same within three years of the filing of the cross-complaint, and prior to the conveyance to the plaintiff; also that defendant frequently since said conveyance to the plaintiff demanded of the plaintiff a conveyance to her of an undivided one-third of said property, or a declaration of trust that the plaintiff held the undivided one-third interest in said land in the complaint described in trust for the defendant, which she always refused to make.

The death of the said Charles Bohm is averred. That since the land was conveyed to the deceased, deeds of trust upon the land have been executed; that the plaintiff has sold a large part of said entire tract of land, realizing therefrom the sum of \$6,900, no part of which sum has been paid to the defendant, although defendant has demanded the one-third part thereof since the said sale.

The defendant, in the cross-bill, avers that the relations between her and the said Charles Bohm, now deceased, and between her and the plaintiff, Mary Bohm, were such as to quiet all suspicions as to any intention on the part of either the plaintiff or the said Charles Bohm to defraud her of any of her rights in the premises, and that it was not until about the time of the said conveyance from Charles Bohm to plaintiff (and within three years of the time of the filing of the amended cross-complaint), that either the said Charles Bohm or the plaintiff refused to execute the declaration of trust, or that she discovered that they or either of them intended not to execute such declaration, but to defraud her of her rights in the premises.

Said Magdalena Bohm avers that she is a widow, and is inexperienced in business matters. She always looked to and relied upon her said son to aid her in the transaction of her business, as one in whom she had a right to and could repose the utmost confidence.

The prayer of the cross-bill is that the plaintiff be declared to hold an undivided one-third interest in the par-

cels of land in the complaint described, free and clear of all liens and claims, in trust for the defendant. That plaintiff be ordered to convey to defendant by a good and sufficient deed a one-third interest in the entire parcels of land in the complaint described; that if there be any incumbrances on the land, as between the parties, such incumbrances be declared a lien on the two-thirds interest belonging to the plaintiff; and for judgment for the sum of \$2,300, and that the same be declared a lien on the undivided two-thirds interest in the parcels of land described in the complaint.

Messrs. BARTELS, BLOOD and BROWN, for appellant.

Mr. JOHN L. JEROME, for appellee.

BECK, C. J. The questions presented by the demurrer to the cross-complaint are: 1. Do the averments of the cross-complaint bring the defendant's case within the twelfth section of the statute of limitations? 2. Do the facts and circumstances set forth in the cross-complaint constitute a cause of action — that is, do they take the case out of the statute of frauds, so as to permit parol proof of the verbal agreement alleged to have been entered into by and between Charles Bohm and his mother, Magdalena Bohm, at the time of the execution of the deed to the said Charles Bohm?

The first ground of demurrer is that the case presented by the cross-complaint is barred by the statute of limitations. The twelfth section of this statute is as follows:

"Bills for relief on the ground of fraud shall be filed within three years after the discovery, by the aggrieved party, of the facts constituting such fraud, and not afterwards." Gen. Stats. sec. 2174.

It is alleged in the demurrer that it appears by the cross-complaint that the failure to execute the declaration of trust occurred, if at all, and was known to the

defendant, more than three years prior to the filing of her cross-complaint.

This proposition implies that the failure to execute the declaration of trust was equivalent to notice, from the time of the execution of the deed, of a fraudulent intent to deny the existence of the trust.

When we consider the close family relationship of the parties — that of mother and son, — and the implicit confidence which the mother says she reposed in the good faith of her son, we can readily understand why the mere failure of the son to put the verbal contract into writing might not, for a long time, excite the suspicion of the mother that he intended to defraud her out of her property.

The defendant alleges positively that she did not discover the fraud upon which she seeks relief, until within three years of the filing of her said cross-complaint, and this allegation, in our judgment, stands unimpeached.

Had the original transaction taken place between persons not occupying fiduciary relations to each other, the delay in seeking relief would afford strong grounds for holding that the action was barred (see *Pipe v. Smith*, 5 Colo. 146); but such is not the case here presented. The defendant alleges that she was a widow, inexperienced in business matters, and that she always looked to and relied upon her son, as one in whom she had a right to and could repose the utmost confidence and trust to aid her in such matters; that the said plaintiff, Mary Bohm, was the wife of her said son, and that the relations existing between herself and the said parties were such as to quiet all suspicions of an intent on the part of either of them to defraud her of her rights in the said premises.

If these allegations be true, and for the purpose of testing the sufficiency of the cross-complaint the demurrer admits them to be true, there seems to be nothing unreasonable in the proposition that the defendant might reasonably rest in fancied security for five or six years after

making the contract described in the statement of the case, before discovering the fraudulent scheme which she charges, to wit, that her son designed to cheat her out of her property; she alleges that she did not discover such fraudulent intent until within three years of the filing of the amended cross-complaint. Under the peculiar circumstances stated, we are of opinion that the case comes within the provisions of the twelfth section of the statute of limitations, and is, therefore, not barred.

The next question is, whether the averments of the cross-complaint are sufficient to take the case out of the *statute of frauds*, and to permit the verbal agreement set up to be proved by parol evidence.

Section 6 of our statute of frauds provides that "no estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing."

It is generally conceded that the statutes of frauds of the several states have not essentially changed the rules established by the English statute of 29 Car. II., c. 3, and that the same evidence is necessary to establish a trust under the former as under the latter. 1 Perry on Trusts, secs. 78, 263.

The first apparent difficulty presented by the case at bar is that the alleged trust is not in writing, as required by the statute. The grantee, it is said, promised to put the verbal agreement in writing, and, had he complied with the promise, the statute would have been satisfied and the rights of the grantor secured. But he failed and refused, after persuading the grantor to execute to him a conveyance of the fee, to put the terms and conditions of the verbal agreement in writing.

If, then, the circumstances set forth in the cross-bill are not sufficient to take the case out of the operation of the statute, the demurrer was properly sustained.

The general rule is that "a promise by a grantee to hold the land for the grantor, or to reconvey it to him, is in effect a declaration of trust, and directly within the mischief which the statute of frauds was intended to prevent. It cannot be taken out of the statute by calling the refusal to fulfill it a fraud. Such a refusal is not a fraud, unless the trust exists, and this is the very thing which the statute provides shall not be proved by parol." 2 Lead. Cases in Equity, part 1, p. 978; *Johnson v. La Motte*, 6 Rich. Eq. 347; Browne on Statute of Frauds, sec. 446.

Some authorities go a step further, and hold that the mere circumstance that a confidence has been violated is not sufficient to exclude the operation of the statute, the object of the legislature in requiring a writing to be signed by the party to be charged being to establish a rule which, though operating hardly in some instances, would in the long run conduce to certainty and prevent frauds. 2 Lead. Cases in Eq. p. 1013.

But cases occur which are recognized as exceptions to the general rules, and which are regarded as not coming within the operation of the statute. The elements usually distinguishing such cases from other cases are fraud, accident and mistake. In the absence of these elements the grantor in an absolute conveyance is prohibited by the statute of frauds from setting up and proving a parol agreement, that the grantee was to hold the land in trust for his benefit.

In order to exclude the operation of the statute on the ground of fraud, where an oral agreement is alleged as a foundation of the trust, the authorities hold that it must appear that the promise was used as a means of imposition or deceit, and if the case, taken as a whole, is one of fraud, the promise may be received in evidence as one of

the steps by which the fraud was accomplished. 2 Lead. Cases in Eq. pp. 1013-1015; *Rasdall's Administrators v. Rasdall*, 9 Wis. 384.

A verbal promise not based upon written evidence, to hold land in trust for the benefit of the grantor, is within the letter of the statute, and cannot be enforced. Courts of equity do not enforce mere verbal promises concerning land. It is accordingly held that a verbal promise to hold the title to land for a certain specified purpose, as to convey it to a designated individual, or to reconvey it to the grantor, is not enforceable, unless the transaction by means of which the ownership is obtained is fraudulent, in which case equity will regard the person holding the property as charged with a constructive trust, and will compel him to fulfill it by conveying according to his engagement. 2 Pom. Eq. Jur. secs. 1055, 1056.

The settled doctrine is that the statute of frauds does not apply to such a case, since the trust arises out of the fraud, and is consequently excepted from the operation of the statute. Id. note 1, and cases cited.

The same rule applies where a person occupying a fiduciary relation to the owner of real estate takes advantage of the confidence reposed in him by virtue of such relation to acquire an absolute conveyance thereof, without consideration, through a verbal agreement, which he promises to reduce to writing; as, for example, that the land conveyed to him is to be held in trust for some legitimate purpose. A refusal, under such circumstances, to reduce the verbal agreement to writing, or to reconvey the land to the real owner, is such an abuse of confidence as to vest a court of equity with jurisdiction to inquire thoroughly into the entire transaction, and to set aside the conveyance, or administer other proper relief. In 2 Pomeroy's Eq. Jur. p. 479, the doctrine is thus stated: "Whenever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that

confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, *although the transaction could not have been impeached, if no such confidential relation had existed.*"

No illustration of the above rule can be stronger, than where an imposition has been practiced upon one party by the other, through confidence generated by the close ties of kindred — as that of parent and child. This is a relation in which the most implicit confidence is usually reposed in the good faith of each other, and, by reason of this intimate relation and confidence, the precautions which would usually be observed in other cases are often omitted, giving opportunities for the practice of imposition which would not be otherwise obtained. When children are of tender years, or inexperienced in matters of business, they may be thus imposed upon by their parents. Again, when the parents become aged, or in dependent circumstances, the situation of the parties becomes reversed, and the like imposition may be practiced, and advantage taken of them, by their children.

Applying the principles and rules above announced to the case before us, as the same is stated in the cross-complaint of the defendant, Magdalena Bohm, it would constitute the late Charles Bohm a trustee, *ex maleficio*, of the tract of land conveyed to him by his mother; for if the facts stated be true, he took advantage of his mother's confidence to obtain the title from her without consideration, by promises to remove the incumbrances, and then to reconvey to her an undivided third of the premises.

A title obtained under such circumstances, and by the violation of confidence inspired by a fiduciary relation of the character here alleged, ought not, according to the rules of equity and good conscience, to stand, but the

party obtaining such an inequitable advantage, or the party taking and holding under such party, with knowledge, or without consideration, should be decreed to hold it in trust, according to the verbal agreement under which it was obtained.

Upon this theory the plaintiff, Mary Bohm, occupies the same position previously occupied by her husband, as to the land conveyed to her, if, as alleged, she took such conveyance with knowledge of the circumstances under which the title was obtained from the defendant.

The case is one of peculiar hardship, as presented to us. Not only was a conveyance of land obtained by a son from his mother without consideration, upon the strength of fair promises made by him, and upon which the mother relied, but the cross-complaint sets up that this land embraced all the means which the mother possessed. This fact alone, in view of the existing relations, if clearly proven, would render the conveyance on its face unconscionable, and would justify the interference of a court of equity, to compel the party obtaining such advantage to do justice. Story's Eq. Jur. sec. 309a and note 1; 2 Pom. Eq. Jur. secs. 956-962; *Highberger v. Stiffler*, 21 Md. 338; *Comstock v. Comstock*, 57 Bar. 453.

The verbal agreement, as stated by the mother, appears to have been fair and reasonable, and had the son shown his good faith by reducing it to writing, as he promised to do, the mother may have been afforded a livelihood out of the unincumbered one-third portion of the premises, or out of the money arising from sales of her interest. The refusal, however, of the son and of the plaintiff, to either put the contract in writing, reconvey to the defendant, or account for the proceeds of sales, would appear to place the defendant in a much worse financial condition than that from which the son proposed to rescue her.

We deem this a case in which it becomes the duty of the court to inquire into the facts, investigate the whole

transaction, and if it appear that, by imposing upon the confidence so confided in him, the son succeeded in obtaining the title to his mother's property without consideration paid therefor, a decree for proper relief should be entered, if the same can be done consistent with the rules and principles of law and equity, under the change of circumstances and lapse of time.

The foregoing views are based upon the allegations of the cross-complaint, and the law arising thereon. We are aware that it is easier to state a cause of action than to prove the same. In cases of this character, where the cause of action would be barred by the statute of frauds but for equitable considerations arising out of the circumstances alleged, which permit a resort to parol evidence to establish the real contract, or the means by which the conveyance was obtained, the rule is that the evidence must be strong and unequivocal, and must clearly establish the trust alleged. *Whitesett v. Kershaw*, 4 Colo. 423; *Troll v. Carter*, 15 W. Va. 567; *Nelson v. Warrell*, 20 Iowa, 469.

In the present case, if the defendant's allegations are not sustained, but it should appear that the transaction was just and fair, and that no undue or fraudulent advantage was taken of the defendant, as alleged, the case presented by the cross-complaint must fail. But if the facts alleged in the cross complaint are sustained by sufficient evidence, then the conveyance made by the defendant must either be set aside or the plaintiff decreed to hold the property as trustee for the said Magdalena Bohm. In the latter case, also, the requisite relief must be decreed as to the money realized by the plaintiff from sales of portions of said land, if any such were made, since they pertain to and constitute part of the same transaction.

Judgment reversed and cause remanded for further proceedings.

Reversed.

9	112
10	234
9	112
13	496
9	112
7a	96
9	112
18a	520

THE BOSTON AND COLORADO SMELTING COMPANY V. PLESS.

1. After notice to the judgment debtor of a *bona fide* transfer of the judgment, the rights of the assignee will be protected from any and all acts of the parties.
2. The statutory lien upon a judgment for the benefit of the attorney is a security of which he may avail himself or not, to obtain fees remaining due him and unpaid.
3. The judgment debtor being a stranger to the contract for fees between the judgment creditor and his attorney, the former is entitled to notice before being charged with liability for fees of such attorney, nor is such debtor obliged to take notice by virtue of the statute that the attorney will claim the benefit of the lien thereby provided for.

Appeal from District Court of Park County.

ON motion to dismiss cause.

The attorney who tried this cause in the court below and obtained the judgment for Pless, took a written assignment of one-half thereof as security for his fees. Upon the appeal this attorney employed Stuart Brothers, and re-assigned to them one-fourth of the judgment to secure their fees. Stuart Brothers rendered valuable services and incurred some expense in connection with the appellate proceedings. Judgment of affirmance was rendered in the supreme court, but a rehearing was afterwards allowed. Subsequent to the affirmance as aforesaid, Stuart Brothers placed upon the files of that court a notice informing appellant that they held an assignment of one-fourth of the judgment, the original assignment or a copy thereof having been previously filed in the court below. Thereafter, pending argument on the rehearing, appellant and appellee, without the knowledge or consent of Stuart Brothers, made a settlement of the controversy, the latter receipting payment in full of the judgment. The written release by appellee contains a stipulation that the *cause* may be dismissed. The motion to dismiss is now resisted by Stuart Brothers upon grounds stated in the opinion.

Messrs. WILKIN and BAILEY, R. D. THOMPSON and E. O. WOLCOTT, for appellant.

Messrs. GEORGE R. GWYNN, STUART BROTHERS and A. W. STOUT, for appellee.

PER CURIAM. The motion to dismiss must be allowed.

We are not advised by the record that the company (the judgment debtor) had notice or knowledge of the assignment to Stuart Brothers till after the settlement was made. Placing the assignment upon the files of the district court, and a written reference thereto on the files in this court, could not be regarded, under our laws, as notice to the company of the attorneys' rights through the assignment. There is nothing before us to show that either of these papers was ever seen by any officer or agent of the company, or the existence thereof mentioned to any such officer or agent, until after the settlement had been fully consummated. Therefore, *as assignee*, Stuart Brothers are not in position to resist the motion under consideration. Freeman on Judgments, sec. 426, and cases; Wade on Law of Notice, sec. 431.

"*After notice to the judgment debtor of a bona fide transfer of the judgment, the rights of the assignee will be protected from any and all acts of the parties.*" *Standard v. Benton*, 6 Colo. 508.

Nor are Stuart Brothers aided by a reliance upon section 85 of the General Statutes, giving attorneys a lien for fees upon judgments obtained by them. While this lien attaches to the judgment at once upon its recovery, as between attorney and client, so that nothing more is necessary prior to the enforcement thereof against the latter by a proper action, we are inclined to the opinion that to hold the judgment debtor for the creditor's attorney's fee, the former must be notified of the attorney's intention to take advantage of the statute. If, without knowledge of this intention, either through a formal

notice or through credible information derived in some other way, the debtor make a *bona fide* settlement of the judgment with the creditor, by payment or otherwise, the attorney cannot look to the former for his unpaid fee.

The statutory lien is a security of the benefit of which the attorney may or may not avail himself. He is, of course, not entitled to it unless there remain due him unpaid fees. The judgment debtor is a stranger to the contract for fees between the judgment creditor and his attorney; hence, in our opinion, the former is entitled to notice before being charged with liability in the premises; he is not bound to presume, in the absence of information on the subject, that the attorney's fee of the latter has not been paid; nor is he by virtue of the statute required to take notice that the attorney will elect to claim the benefit of the lien thereby provided for.

It is more reasonable to suppose that the legislature intended to leave in force the common law rule requiring notice in such cases. Stating this common law rule, see Wharton's Agency, secs. 628, 629; Weeks on Attorneys, secs. 379, 384.

We are aware that there is at least one state, wherein, under a statute somewhat similar to our section 85, it is held that the judgment debtor is charged *without notice*. But we do not feel satisfied with the reasons stated in support of this view, and have therefore declined to follow the opinions announcing it.

The position taken in some decisions, that, where a judgment is for costs only, the record is itself notice to all parties of the attorney's lien thereon for his costs, need not be here considered; because, in the first place, we are dealing with a statute which does not refer to costs, and secondly, such was not the judgment in the case at bar. There is no pretense that actual notice of the reliance by Stuart Brothers upon the statute was given the company until after the settlement; and simply placing

the papers above mentioned upon the files was not constructive notice to the company of their intention in the premises.

The motion is allowed.

METZLER, IMPEADED, ETC., V. JAMES.

1. In a chancery proceeding it is proper for the clerk of the lower court, on an appeal, to certify up to this court, under section 23 of the present appeal statute, the written testimony, the depositions, and all other evidence and papers offered or used as evidence; the original pleadings and all other papers affecting the substantial rights of the parties which were used or offered at any step in the cause, save in perfecting the appeal; the record entries come up by transcript.
2. Whether the cause be in the nature of an action at law or suit in chancery, in order to transfer it to the docket of this court, the clerk of the lower court, under section 9 of the statute, must transmit a transcript of the judgment or order appealed from, or so much thereof as is mentioned in the notice of appeal; also a transcript of the notice of appeal, together with proof of service thereof, and a transcript of the appeal bond.

Appeal from Superior Court of the City of Denver.

THE facts are stated in the opinion.

Messrs. DECKER and YONLY, for appellant.

Messrs. LONG and HINSDALE, for appellee.

PER CURIAM. A decree in an equitable proceeding was rendered by the superior court of the city of Denver on the 12th day of May, 1885, in favor of the plaintiff James and against the defendant Metzler. An appeal from said decree to this court was prayed by said Metzler and allowed by the court, upon condition of the filing and approval of an appeal bond, which was duly filed and approved.

Several attempts have been made by the appellant to transfer the appellate proceedings to this court, but, thus far, the steps taken have been defective. As a result of the several errors committed on the part of the appellant (most of them, we regret to say, through carelessness), there are now six motions pending for decision in the proceeding.

We find, however, that a decision of the questions arising in two of the pending motions will dispose of all the rest.

A motion is made for leave to file a bill of exceptions.

While the document presented is not properly a bill of exceptions, yet we are of opinion that, to a certain degree, it supplies the place of a bill of exceptions and is entitled to be filed in the case.

It contains the report of the referee, and includes the testimony, exceptions to the rulings of the referee, certain original papers, and a transcript of proceedings had in the court below.

Being in the nature of a chancery proceeding it was proper for the clerk of the superior court to certify up to this court, under *section 22* of the present appeal statute, the written testimony, the depositions, and all other evidence and papers used or offered as evidence. The original pleadings come up in the same way, and all other papers affecting the substantial rights of the parties which were used or offered at any step in the cause, save in perfecting the appeal. Record entries come up by transcript.

The cause having been referred to a referee to take the testimony, to state the account and to report his findings of law and fact, it will be seen that his report would necessarily comprise the principal matters embodied in a bill of exceptions.

This motion is allowed.

The other motion referred to is a motion for leave to file a supplemental transcript of the record, embracing

the order of the court below granting the appeal, together with a transcript of the appeal bond.

We have decided to allow this motion also, and to permit a proper transcript of said order and appeal bond to be filed.

We cannot, however, permit the document tendered for filing under this motion to be placed on file, for the reason that it does not comply with the law. It properly contains a certified transcript of the order granting the appeal, but, instead of a transcript of the appeal bond, the original bond itself is transmitted.

This instrument belongs to the files of the court below, and there is no authority, either in the present statute or in the former act, for removing it from the files of said court.

The appeal in this case was granted under the former law, but the appellant is endeavoring to transfer the cause to this court under the present law, which he has a right to do.

There is but one mode provided under the present act for transferring a cause on appeal to this court, although as to certain portions of the record,—whether they shall be brought up in the original form or by abstract, depends upon the character of the action. But whether the cause be in the nature of an action at common law, or an action in chancery, in order to transfer the cause to the docket of this court, the clerk of the court below must transmit to the clerk of this court, as required by section 9 of the act, a transcript of the judgment or order appealed from, or so much thereof as is mentioned in the notice of appeal; likewise a transcript of the notice of appeal, together with the proof of service thereof, and a transcript of the appeal bond.

Several reasons may be assigned for retaining an appeal bond on file in the trial court, two of which may be mentioned,—the danger of loss if taken from the files of the trial court, and the fact that, if transmitted to and

filed in an appellate court, it would belong to the files of said court; whereas, if occasion to sue upon it occurred, it would be needed in the court below.

This provision of the statute not having been complied with, the appellant will be allowed twenty-four hours in which to procure a proper supplemental transcript of the record, which thereupon may be filed.

Both of the foregoing motions were filed by the appellant for the purpose of curing errors committed in attempting to institute appellate proceedings in this court. These errors, on the part of the appellant, have occasioned needless expense as well as unnecessary delay. As above intimated, we are of opinion that they might have been avoided by the exercise of reasonable care and attention.

Considering it to be our duty, under the circumstances, to impose terms, as a condition upon which the foregoing motions are granted, it is therefore *Ordered*, that the appellant, within ten days, pay to the clerk of this court, for the use of the appellee, in payment of costs and expenses incurred by him in and about this appeal, and as the condition upon which said motions are granted, the sum of \$75.

Justice ELBERT did not sit in this case.

Motions allowed.

APRIL TERM, 1886.

DENVER & NEW ORLEANS R. R. Co. v. LAMBORN ET AL.

1. The deposit as security for possession under the statute, pending condemnation proceedings, cannot be used in a subsequent condemnation proceeding by the same petitioner and for a portion of the same premises, the damages suffered by respondent through the first proceeding not having been determined and paid.
2. This court cannot take original jurisdiction of condemnation proceedings.

Error to District Court, Pueblo County.

MOTION to amend judgment.

Messrs. WELLS, SMITH and MACON, for plaintiff in error.

Mr. JOHN M. WALDRON, for defendants in error.

PER CURIAM. In this case there were three orders of the court or judge to which objection was taken by plaintiff in error: *First*, the order overruling petitioner's exceptions to the findings and report of the commissioners; *second*, the order denying the so-called supplemental petition; and, *third*, the order commanding petitioner to pay the amount of the damages awarded or vacate the premises by a given time.

Upon a motion to dismiss on the ground that there was no final judgment, this court held the first of the foregoing orders to constitute, under our peculiar statute on the subject of eminent domain, such a final adjudication as authorized an appeal or writ of error. This final order of the court below was ultimately affirmed, but the judgment here entered does not, in words, either reverse or affirm the remaining two orders above mentioned.

Counsel now urge that the opinion filed requires a reversal of the second and third orders, and they insist that the judgment record in this court be amended accordingly.

With reference to the order denying defendant's supplemental petition, we have this to say: The record before us shows that one of the principal grounds relied on by the district judge in making his ruling was the fact that the paper was filed without "leave of court first had and obtained." Upon this question nothing was said in the opinion. We did not consider the authority of the judge to deny the petition because it was filed without leave, or determine the propriety of his action in so doing. Until we had discussed this question of practice, and decided that the judge had no power to deny such an application upon the ground mentioned, we would certainly not be prepared to reverse this order, even were it proper to consider, on error, proceedings subsequent to the final judgment complained of.

But counsel insist most strenuously that, under the opinion, the remaining order should be reversed. We cannot accede to their demand for the following reasons: *First*, the order mentioned, as already stated, commanded petitioner to pay the amount of the award or to vacate the premises; *second*, the opinion does not discuss or pass upon the authority of the court, in view of the statute, to make such an order, though subsequent to final judgment, nor does it contain anything contrary to the spirit of the order.

While the right to abandon is upheld, petitioner is by no means permitted to retain possession of the premises without payment of the award. The whole tenor of the opinion is to the effect that when an award is finally sustained upon exceptions thereto, petitioner must pay the amount thereof, or abandon the premises.

Counsel further urge us to provide by order that the sum deposited at the inception of the proceedings before

us, or a part thereof, be used by the petitioner as the statutory deposit or security for possession pending further proceedings for the right of way. They also ask that an additional provision be incorporated into the judgment of this court, which shall permit petitioner to retain possession of the right of way pending condemnation proceedings therefor. They insist upon two impossibilities.

In the first place, the proceeding to condemn the right of way, whether it be permitted by the district judge as an adjunct to the present action, or whether instituted without any reference thereto, is in its essential character an original proceeding. A new deposit of an amount to be fixed by the court or judge as a condition precedent to the retention of possession is necessary. The \$3,000 lodged with the clerk at the inception of these proceedings must be held until the damages by reason thereof have been determined and liquidated. To say otherwise would be to abandon one of the leading propositions with reference to preliminary occupancy announced in the former opinion,—a proposition concerning the correctness of which we entertain no doubt.

The second fatal objection to counsel's demand last above stated is that this court is not authorized by the statute to take original jurisdiction of condemnation proceedings, and therefore any order by us permitting petitioner to retain possession pending an original proceeding hereafter instituted for the right of way would be clearly unwarranted.

It is true, as asserted in the oral argument, that in so far as the opinion filed deals with the subject of abandonment it relates to a question that technically arose subsequent to the order designated as a "final judgment." But had we declined to consider this subject, irreparable injury might have resulted to petitioner, and the main question, zealously contested in argument, and urged for adjudication, would have been left undecided. In view

of the peculiar attitude of the parties before us, the diverse ideas concerning their respective rights under the statute, the unsettled condition of the practice, and, especially, the future action of petitioner in the premises, we were persuaded to depart from the usual custom of this court in other kinds of cases, and determine this question.

The motion is denied.

ELBERT, J., did not take part in the decision of this motion.

CLARE ET AL. V. THE PEOPLE.

1. Where the evidence in a criminal case is wholly circumstantial, it is error to instruct the jury that they need not be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt.
2. A charge containing two conflicting propositions of law upon a material point, one correct and the other incorrect, must be held erroneous, it being impossible to determine upon which proposition the jury relied.
3. To prevent reversal for error in the charge, it must appear that the prisoner could not have been prejudiced thereby.
4. Where the title of a statute contains but one general subject, the addition in the title of subdivisions under that subject does not render the act obnoxious to objection under section 21, article V, of the constitution.

Error to District Court, Clear Creek County.

Messrs. TILFORD and GILMORE and R. S. MORRISON, for plaintiffs in error.

Mr. T. H. THOMAS, Attorney-General, for the People.

HELM, J. Plaintiffs in error, being lessees of a mine, were tried and convicted of removing and concealing ore

9	122
9	166
9	491
10	300
9	122
13	525
9	122
14	404
9	122
17	250
9	122
18	184
2a	464
9	122
21	334
21	434
22	176
23	526
5a	324
9	122
23	302
23	324
9a	551
9	122
24	70
9	122
25	276
9	122
26	361
9	122
27	213
9	122
31	119

therefrom with intent to defraud the owner thereof. The prosecution took place under section 2513 of the General Statutes. The evidence upon which the conviction rests is not contained in the abstract before us, but counsel agree that it was "wholly circumstantial." Two assignments of error are pressed for consideration.

One of the instructions given on behalf of the state contained, *inter alia*, the following:

"* * * That the rule requiring the jury to be satisfied of the defendant's guilt beyond a reasonable doubt, in order to warrant a conviction, does not require that the jury should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt. * * *"

The proposition which the court doubtless intended to announce is that it was not necessary for the state to have proven beyond a reasonable doubt every circumstance offered in evidence, and tending to establish the ultimate facts or circumstances on which a conviction depended. This would have been, in our judgment, good law. But while such was the purpose which the court sought to accomplish, it is exceedingly doubtful if the language employed did not mislead the jury. The metaphor used is inaccurate, and liable to misconstruction. It is incorrect to speak of a body of circumstantial evidence as a *chain*, and allude to the different circumstances as the *links* constituting such chain; for a chain cannot be stronger than its weakest link, and if one link fails, the chain is broken. This figure of speech may perhaps be correctly applied to the ultimate and essential facts necessary to conviction in criminal cases, since if one be omitted, or be not proven beyond a reasonable doubt, an acquittal must follow. It is not true, however, that each and every of the minor circumstances introduced to sustain these ultimate facts must be proven with the same degree of certainty. Some of these circumstances may fail of proof altogether, and be discarded from consider-

ation by the jury, yet the ultimate fact to establish which they were presented may be shown beyond a reasonable doubt. The evidence in cases similar to the one before us has been more aptly likened to a cable. One, two, or a half dozen strands may part, yet the cable still remain so strong that there is scarcely a possibility of its breaking.

But the word "circumstance" and the word "fact" are frequently used interchangeably. In 1 Bouv. Dict. 569, they are given as synonyms, and instances sometimes arise when it would puzzle a professional philologist to tell which of the two words would more accurately characterize a given "action" or "thing done." In cases where the conviction depends upon circumstantial evidence, it often happens that one or more of the ultimate or essential matters may very appropriately be called "circumstances," and such matters, whether spoken of as circumstances or as facts, must be established by the state beyond a reasonable doubt. 1 Starkie, Ev. 501; *Com. v. Webster*, 5 Cush. 295.

The court in the instruction before us could not have referred to the latter class of circumstances, yet the danger is that the jury so understood him. They may not have distinguished between the minor circumstances and the ultimate circumstances or facts of the case. Since the circumstances mentioned in the charge are spoken of as "links in a chain," and designated as those "relied upon to establish defendant's guilt," it is not at all improbable that the jury regarded them as being — *First*, that defendants were lessees of the mine; *second*, that Ellen Olds was the owner thereof; and, *third*, that the ore was taken with intent to defraud such owner,—each of which propositions must, under the statute, have been established beyond reasonable doubt. It is true, in a sense, that every circumstance, however trivial, offered by the state in evidence, is *relied upon*; but it is true, in a broader sense, that the state *relies upon* the ultimate

facts or circumstances, the establishment of which is absolutely essential to conviction. We deem it quite as reasonable to suppose that the jury misunderstood and misapplied the language used as that they comprehended its appropriate meaning and application. For this reason the judgment must be reversed.

It is no answer that other portions of the charge, and even other parts of the same instruction, stated correctly the law upon the subject of reasonable doubt. Where the charge in a criminal case contains in one part an important correct legal proposition, and in another an incorrect and conflicting proposition upon the same subject, the subject referred to being material to conviction, it cannot be said that the error is avoided; for it is impossible to know upon which proposition the jury relied. To prevent reversal for error in the charge, it must appear that the prisoner could not have been prejudiced thereby. *Mackey v. People*, 2 Colo. 13; *People v. Campbell*, 30 Cal. 312; *Caw v. People*, 3 Neb. 369; *Greene v. White*, 37 N. Y. 407, and cases cited.

In view of a new trial, it becomes necessary to consider two other objections urged against the validity of the judgment. This prosecution was brought under an act entitled "An act to facilitate the recovery of ore taken by theft or trespass, to regulate sale and disposition of the same, and for the better protection of mine owners." Gen. St. 747.

It is urged — *First*, that the foregoing title contains more than one subject; and, *second*, that the section under which this conviction took place deals with a subject not clearly expressed therein. Therefore, counsel contend that section 21, article 5, of the constitution, was here violated by the legislature in two particulars. The latter section reads: "No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title. * * *" At first glance, three matters appear to be mentioned in

the title above quoted ; but, upon examination, it will be seen that the first two are fully comprehended within the third. Had the legislature been content to name the statute "An act for the better protection of mine owners," in our judgment both of the matters specifically mentioned would have been covered. Provisions regarding the recovery of ore taken by theft or trespass, and also those regulating the sale and disposition thereof, would naturally be embraced within an act thus entitled. There being one general subject expressed, the fact that the legislature saw fit to incumber this title with two specifications under that subject does not render it obnoxious to the constitutional objection now urged. One of the two purposes effectuated by this constitutional provision was to prevent uniting with each other in statutes incongruous matters having no necessary connection or proper relation ; and where, as in the case at bar, one general subject be clearly expressed, the addition of subdivisions thereof does not necessarily vitiate the whole title. Of course, an instance might exist where it clearly appeared that although the general subject were given in the title, yet the legislature intended to limit legislation under this subject to certain subdivisions thereof specifically mentioned. Such, however, is not true in the case at bar.

Regarding the other objection, above mentioned, we need say but little. The remaining purpose of the constitutional provision before us was to prevent imposition upon the legislature and the people, through the pernicious practice of dealing in bills with subjects of which the titles give no intimation. But this constitutional inhibition must receive a reasonable interpretation, and whenever a matter contained in the statute may fairly be considered germane to the subject expressed by the title, it is sufficient. See *Golden Canal Co. v. Bright*, 8 Colo. 144; *Cooley*, Const. Lim. 142-144.

Provisions with reference to the removing or conceal-

ing of ore by lessees of a mine with intent to defraud the owner, making such act a crime, and defining the punishment thereof, are, we think, fairly comprehended within the title of "An act for the better protection of mine-owners." It is doubtful if a more appropriate method could be devised of guarding the interests of such property holders against this kind of larceny. Such a penal provision is clearly germane to the subject named.

For the error above mentioned in instructing the jury the judgment is reversed.

9	127
14	411

ALLENSPACH V. WAGNER.

1. Where the defendant applies to the county court to fix the time within which an appeal bond shall be filed, and the plaintiff's attorney is present and participates in the discussion, it is not error for the district court to refuse to dismiss the appeal on the ground that no written notice was served on the plaintiff's attorney.
2. A covenant to pay rent is not personal but runs with the land; the grantee of the reversion stands in the same position to the tenant that the lessor did before he parted with the reversion.
3. Where a tenant holds a lease which is to expire upon the sale of the leased premises, and the new owner under a sale of the land offers to continue him as tenant, under the lease, the tenant cannot recover damages for an eviction by the grantee, the eviction being in consequence of the non-payment of rent under the lease.
4. Nor is it sufficient in such case for the tenant to say that the sale was fraudulent and void. A court will not inquire into a fraud except at the instance of the party injured by it.
5. Special matters constituting a good defense being set up in an answer and not being traversed may entitle the defendant to judgment of nonsuit.

Error to District Court, Arapahoe County.

THIS suit was originally brought in the county court. The complaint alleges, in substance, that on the 29th day of March, A. D. 1880, the defendant Wagner leased to plaintiff certain premises in the city of Denver for the

period of two years, to be used as a dwelling-house and saloon; that on or about the 1st day of April, A. D. 1880, the plaintiff entered into possession of the premises and opened a saloon therein; that he spent large sums of money in painting, repairing, furnishing and fitting up the building for said business, and added valuable improvements thereto, and fixtures, all amounting to the sum of \$1,000; that after the plaintiff had repaired, painted, and added his improvements as aforesaid, and after he had established a thriving and profitable business at said place, the defendant did wilfully and maliciously enter into a conspiracy with one Pettinger to defraud the plaintiff out of his leasehold interest in and to the same; and that, in pursuance of said wilful and malicious conspiracy, the defendant caused a deed of said premises, together with other property, to be made to the said Pettinger with intent to defraud the plaintiff, without any consideration whatever therefor; that on or about the 15th day of June, A. D. 1880, the said Pettinger and the said defendant, in pursuance of said conspiracy, caused an action to be commenced before Whittemore, a justice of the peace, in the name of Pettinger, to secure possession of the premises on the ground of the said false, fraudulent and pretended sale; that the case was taken on change of venue to C. S. Eyster, another justice of the peace, where judgment was rendered against the plaintiff, and in favor of Pettinger, for the possession of said premises; and that afterwards, on the 26th day of July, A. D. 1880, plaintiff was ousted and ejected from the premises by a constable of said county, under and by virtue of a writ of restitution issued by the said Eyster on said judgment; that said plaintiff afterwards, on the 23d day of December, A. D. 1880, removed said case to the county court by a writ of *certiorari*; and that on the 21st day of January, A. D. 1881, the case having been regularly tried in said county court, said court rendered a judgment in favor of the plaintiff.

iff against said Pettinger, which said judgment remains in full force and effect; that immediately after plaintiff was so ousted and ejected from said premises the defendant took possession of the premises, with all the valuable improvements thereto, and has remained in possession of the same, and has used and occupied the same, for his own use and benefit ever since, and still continues to so use and occupy the same, to the exclusion of the plaintiff and to his damage to the sum of \$2,000. The complaint further alleges that, by reason of said malicious prosecution, in pursuance of said conspiracy to defraud the plaintiff, he has been put to great trouble and expense, and been compelled to pay out large sums of money for costs and attorney's fees, to his damage to the sum of \$1,000. It further alleges that by reason of the ouster and ejectment of the said plaintiff from the said premises in pursuance of said conspiracy, the plaintiff's business was entirely destroyed and his credit greatly impaired, and the plaintiff was put to great trouble and expense in moving his fixtures and furniture and in procuring other premises for the use of himself and family, to his damage to the sum of \$1,000; that at the time the plaintiff was so ejected and ousted from the premises, and for a long time thereafter, the plaintiff was unable to procure another place in which to carry on his business, and that by reason thereof he lost his time and labor, to his damage to the sum of \$2,000. Wherefore plaintiff prays judgment against said defendant in the sum of \$2,000, his damages, and costs of suit.

The lease attached to the complaint as an exhibit contains a condition of forfeiture for non-payment of rent, and provides that in such case the lessor may elect to declare the term ended and to re-enter the premises, either with or without process of law. *It also contains a provision that the lease shall terminate at any time, if the lessor, Wagner, shall sell the said property.*

The answer admits the lease to the plaintiff and the sale

to Pettinger, but denies the conspiracy to defraud; that the sale was a pretended sale, without consideration; and all the other material allegations of the complaint. It then sets up the following defense:

“And defendant avers that said Pettinger, on the purchase of said property by him from defendant, went into possession of all thereof and collected the rents thereof, and retained the same to his own use, and procured several of said buildings to be insured for his own use, and let portions thereof to various new tenants and received rents from defendant for the portion thereof occupied by him; and did, after said purchase, offer to and was ready and willing to continue said plaintiff as his tenant under said lease during the unexpired term thereof, as though no sale of said premises had been made; but plaintiff refused to continue as said Pettinger’s tenant on said terms, but demanded from said Pettinger a new lease with new conditions, omitting therefrom the provisions of the former lease making the same terminate upon the sale of the leased property by the lessor; and, further, said Pettinger offered to give to plaintiff a new lease with the terms thereof so changed, but to run for one year, and plaintiff refused said offer also; and also said Pettinger offered to said plaintiff to make him a new lease for said premises on the same terms and for all the unexpired portion of time provided for in the former lease, and plaintiff refused said last-mentioned offer; and said Pettinger offered to plaintiff a new lease on said terms, and for the time mentioned in the former lease, conceding to the plaintiff the omission therein of the clause giving a lien for rent on the personal property of the lessee thereunto in said leased building, and plaintiff refused said last-mentioned offer also; and plaintiff at same time refused to pay to said Pettinger the rent then due for the month then elapsed and unpaid, and refused to continue as tenant under said Pettinger and pay rent according to the terms of the lease given him by defendant; but demanded to

stay in said premises, and refused to pay any rent therefor or accept any of the said offers of the said Pettinger; and thereupon, there being one month's rent then due said Pettinger (twenty-five dollars), back rent then unpaid on said premises by the terms of said lease, said Pettinger brought suit against said plaintiff before said O. A. Whittemore, justice of the peace, for the recovery of the possession of said leased premises, *as well because of the termination of plaintiff's tenancy therein for non-payment of rent thereon, as provided in said lease, as by reason of the termination of plaintiff's tenancy by the said sale of said premises*; and said cause for recovering said possession was tried by said C. S. Eyster, justice of the peace, on change of venue from said O. A. Whittemore, justice of the peace, and by him judgment was rendered in said suit in favor of said Pettinger and against said plaintiff herein, which is the same suit mentioned in plaintiff's complaint herein."

There was no replication to the answer. On the trial in the county court the plaintiff recovered. The defendant appealed to the district court, and on the trial judgment of nonsuit was entered, the court holding that the defendant's answer stated a good and sufficient defense to the action. To reverse this judgment plaintiff brings this writ of error.

Mr. JOHN P. BROCKWAY, for plaintiff in error.

Messrs. STALCUP, LUTHE and SHAFROTH, for defendant in error.

ELBERT, J. The defendant in error, Wagner, took his appeal from the county court to the district court under section 5, chapter 23, General Laws, 254. No written notice was given the plaintiff of defendant's application to the county court to fix the time within which the appeal bond should be filed. The refusal of the district court to dismiss the appeal on this ground was not error,

as it appeared that plaintiff's attorney was present in the county court at the time of the application, and participated in the discussion respecting it. Such being the fact, no written notice was necessary, however it might be otherwise.

We think the district court right in holding the special matter set up in the answer, and unreplied to, a good defense.

The offer of the defendant's grantee, Pettinger, to waive the provision of the lease terminating the tenancy in case of sale, and to treat the sale in all respects as subject to plaintiff's lease, left the plaintiff without any legal ground of complaint. It then became his legal duty to either pay rent to the grantee of the reversion or to surrender the leased premises. He could not complain that the defendant sold subject to the lease, as his right to sell remained unabridged. He could not complain of having to pay rent to Pettinger instead of Wagner, for a covenant to pay rent is not personal, but runs with the land, and, in this case, the plaintiff's covenant to pay rent was a covenant with the defendant and "his assigns." As to the tenant, the grantee of the reversion stands in the same position that the lessor did before he parted with the reversion. *Tayl. Landl. & Ten.* § 439.

Nor is it sufficient for the plaintiff to say that the sale was fraudulent and void. A court will not inquire into a fraud except at the instance of the party injured by it. The effect of the sale would have been to terminate the plaintiff's leasehold estate under the provision of the lease, had the parties insisted upon it. But the defendant's grantee offered to waive the provision, and to treat the sale as subject to the lease. This left the plaintiff without a case calling for the interference of the courts. Had the grantee insisted upon the forfeiture, and had the powers of a court of equity been invoked by a bill for equitable relief against the alleged fraudulent sale, a decree that the sale should be treated as in all respects

subject to his lease would have met all of the plaintiff's equities. What a court of equity would have decreed, conceding the sale to have been fraudulent, was offered the plaintiff without suit, and by him refused. So the answer alleges. Substantially, the answer is this: It denies the fraudulent conspiracy; admits the sale and eviction; but alleges, in effect, that the sale of the leased premises was subject to the lease, and that the plaintiff was evicted by reason of his refusal to pay the stipulated rent to the defendant's grantee. This was a good defense, and, not having been traversed, the defendant was entitled to judgment of nonsuit.

We do not inquire into the proceedings in the action of forcible entry and detainer before the justice and county court. This is not an action to recover possession, but for damages; and we do not see that the judgment in the county court affects the defense. The special matters set up in the defendant's answer were not necessarily in issue in the action in that court, nor do they appear to have been in issue in fact. Wells, Res. Adj. 167.

The judgment of the court below is affirmed.

Affirmed.

DANIELS V. DANIELS.

1. In taking an appeal the first essential act, without which it will have no validity, is the filing of the notice thereof. Unless the filing of the notice either precedes or is contemporaneous with the service thereof, it will be ineffectual.
2. An order allowing temporary alimony and counsel fees is such a final order or decree as may be appealed from under the code.
3. Although the statute makes no provision for alimony except as an incident to proceedings for divorce, this does not preclude the court from granting temporary or permanent alimony in a proper case, although a decree for divorce is not included in the relief prayed for.
4. To entitle a wife to alimony *pendente lite*, and for means to prosecute her suit, her petition should establish a *prima facie* case, and

9	138
10	545
9	133
12	512
9	133
15	126
9	133
4a	509
9	133
21	256
6a	100
7a	23
9	133
8a	198
9a	322
9	133
25	379
9	133
126	35
13a	240
13a	278
14a	181
9	133
129	297
20	236
9	133
31	210

be supported by verification and affidavits; but the merits of the original or main controversy cannot be inquired into on such a petition.

5. A contract of separation of man and wife must be untainted by fraud, and the contract must be fair and reasonable, considering the circumstances of the parties.

Appeal from District Court, Arapahoe County.

THE facts are stated in the opinion.

Messrs. PATTERSON and THOMAS and BENEDICT and PHELPS, for appellant.

Messrs. RUCKER and EWING and TELLER and ORAHOOD, for appellee.

BECK, C. J. The purpose of the action instituted in the district court by the plaintiff, Lilyon B. Daniels, against her husband, William B. Daniels, and now pending therein, as shown by the prayer of the complaint, is to obtain a decree annulling the articles of separation entered into by the parties upon the 16th day of January, 1883, and to compel the defendant to pay the plaintiff the sum of \$25,000 annually as permanent alimony. A separate petition was filed in said cause praying for alimony *pendente lite*, to which an answer was filed by the defendant, and the issues therein formed submitted to the court. The court thereupon ordered and adjudged that the defendant pay into court, for the use of the plaintiff, the sum of \$1,000,—\$700 thereof being for the use of her counsel as their solicitors' fees, \$300 thereof for her use in procuring testimony, witnesses, and other expenses incidental to the prosecution of her suit,—and the further sum of \$75 a month as alimony *pendente lite* until the further order of the court. From this decree the defendant appealed to this court. The defendant also demurred to the original complaint, which demurrer the court overruled, and thereupon defendant appealed from the order overruling the demurrer. Both of these appeals

are now submitted for the consideration and judgment of this court.

The first question to be considered is the regularity of these appeals. The appeals are taken under the act of the legislature approved April 23, 1885 (Laws 1885, p. 350), and it is alleged by counsel for appellee that in the taking of said appeals the statute was not complied with on the part of the appellant; consequently, that neither of said appeals can be entertained by this court.

The decree for alimony *pendente lite* was made October 12, 1885. The objection to the regularity of this appeal is that no copy of the notice of appeal was served on the plaintiff or her attorneys; and the objection to the appeal from the order overruling the demurrer to the original complaint is that the notice of appeal was served on the plaintiff's attorneys nine days before the original notice was filed in the clerk's office of the court below.

Section 8 of the act referred to provides as follows:

"An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered or filed a notice stating the appeal from the same, or some specific part thereof, and serving a copy of the notice of appeal on the adverse party or his attorney."

In so far as the objection relates to the appeal from the order overruling the demurrer it appears to be well taken. The statutory provision above quoted does not differ materially as to the mode of taking an appeal from the provision appearing in section 339 of the code of 1877, except that the latter section requires, in addition to the filing of notice and service of the same on the adverse party or his attorney, the execution of a bond. In the case of *Alvord et al. v. McGauhy*, 4 Colo. 97, the notice of appeal was not filed in the office of the clerk until two days after a copy of said notice was served upon the attorney of the appellee. In that case the court say: "In taking an appeal the first essential act, without

which it will have no validity, is the filing of the notice thereof. Unless the filing of the notice either precedes or is contemporaneous with the service thereof, it will be ineffectual." In *Bacon v. Lamb*, id. 474, it was held if the service of the notice and the filing thereof in the clerk's office were on the same day, the acts will be presumed to have been contemporaneous. In California, under a similar statutory provision, it was held that "the filing of the notice of appeal is made a constituent element of its character as a notice, and, consequently, must precede or be contemporaneous with the service of a copy of the notice on the adverse party; otherwise that which may purport to be a copy of a notice or duplicate thereof fails to be such for the want of an original." *Buffendeau v. Edmondson*, 24 Cal. 94. These authorities, and the phraseology of the statute itself, are decisive of the objection raised to the regularity of the appeal from the order overruling the demurrer. The statute not having been substantially complied with, the appeal from that order cannot be considered.

In respect to the order or decree for alimony *pendente lite* and suit money, the objections urged as to the irregularity of the appeal from this order do not exist. The original transcript filed in this court shows that this order was made October 12, 1885, and that notice of appeal therefrom was filed in the clerk's office, and a copy thereof served on the attorneys of the appellee upon the same day, October 12th. The omissions relied upon appear in the abstract only, not in the transcript. Another objection urged to the validity of this appeal is that no exception to the ruling of the court granting alimony *pendente lite* was reserved by the appellant. This is also a mistake, as is fully shown by the bill of exceptions, signed by the judge and made a part of the record in the cause, wherein occurs the following: "To which ruling and decision of the court in allowing, decreeing, ordering

and adjudging said support, maintenance, counsel fees," etc., "aforesaid, the defendant, by his counsel, then and there excepted."

But it is contended, upon other grounds, that no appeal lies from this order or decree: (1) Because it was made in an equitable action and was "a discretionary order;" (2) Because an appeal does not lie from such order under the statute of 1885.

The proposition that the order was discretionary, and for that reason not appealable, assumes one of the main points in controversy, namely, that the court had jurisdiction to make the order. If it be true that orders of this nature are within the discretion of the court in divorce cases, it determines nothing in a case like this, where a divorce is no part of the relief sought, and the jurisdiction of the court is challenged on that ground. Whether or not such an order, even in divorce cases, is purely discretionary and not reviewable admits of grave doubts, under recent decisions.

The cases cited by appellee in support of the proposition that no appeal lies in this case throw but little light upon that question. They are principally cases relating to interlocutory judgments for costs; as in the case of *Briggs v. Vandenburg*, 22 N. Y. 467, wherein it was held that under the provisions of the code, in an action prosecuted or defended by a receiver, costs may be recovered as in an action against a person prosecuting or defending in his own right; and that the "court may, in its discretion, in cases mentioned in the section, require the plaintiff to give security for costs;" and that no appeal lies from such order. So, also, in *Briggs v. Bergen*, 23 N. Y. 162, it was held that no appeal lies from the supreme court from an order striking out a sham answer under the section providing that "sham and irrelevant answers may be stricken out on motion, and upon such terms as the courts in their discretion impose." In *Walker v. Spencer*, 86 N. Y. 162, an appeal appears to have been

taken from certain portions of an interlocutory judgment allowing costs and expenses to one of the parties on the overruling of a demurrer. In this case the appeal was dismissed on the ground that while an appeal lies in such cases to the supreme court, it does not lie to the court of appeals. *Smith v. Rathbun*, 88 N. Y. 660, was also a case of an interlocutory order entered upon overruling a demurrer to the complaint, from which an appeal was taken. The appeal in this case seems to relate to the form of the order, and the court say: "This is, therefore, a mere controversy as to the form in which the supreme court shall express its decision; that is a controversy to be settled by that court, and not appealable to this court." *Marble v. Bonhotel*, 35 Ill. 240, holds that the granting of a temporary injunction is a matter of sound discretion, and cannot be reviewed upon appeal. In *Richards v. Burden*, 31 Iowa, 305, it was held that an appeal to the supreme court did not lie from the ruling of the court below upon the admission or exclusion of evidence, but that the question may be presented on an appeal upon the final decision of the cause. In *Forrest v. Forrest*, 25 N. Y. 518, the appeal was from part of a judgment for divorce fixing the plaintiff's alimony; and while it was held that the authority of the court was discretionary as to the amount of the alimony, and from what date it should commence, yet the appeal appears to have been entertained for the purpose of ascertaining whether the power had been arbitrarily exercised. The court say: "There is no other rule or criterion to guide than the *boni viri arbitrium*; and as it is a judicial, and not an arbitrary, discretion to be exercised, we do not say there may not be an appeal from such an order." Upon the question of our jurisdiction to entertain this appeal the authorities cited in support of the views of appellee's counsel are not sufficiently analogous to the proceedings before us to warrant its summary dismissal.

We will now consider the following questions: (1) Is

the order allowing temporary alimony and counsel fees such an order or decree as may be appealed from under section 1, Code Amend. 1885? (2) If appealable, did the court below have jurisdiction to enter the judgment or decree appealed from? (3) Did the court err in allowing said temporary alimony and suit money, and in entering judgment therefor?

First. Is the order appealable? There are two sections of the act of 1885 conferring appellate jurisdiction on this court. The first section is as follows:

“The supreme court has appellate jurisdiction over all judgments and decisions of all other courts of record, as well in case of civil actions as in proceedings of a special or independent character, except in actions for damages commenced before a justice of the peace in which the judgment was for a less sum than \$50.” Laws 1885, p. 350.

The provisions of this section are broad enough to cover every judgment or decision which is in the nature of a final judgment, and which possesses the elements of a final judgment. When such a judgment is entered nothing remains to be done but to enforce it, and it may be enforced in the same manner and by the same means usually employed to coerce the payment of money judgments and decrees. The judgment or decree appealed from was rendered in an original proceeding, and it was based upon that proceeding; but it was rendered upon separate pleadings, wherein distinct and different relief was sought from that for which the original suit was instituted. The object of the original complaint was to obtain a decree annulling articles of separation, and for the allowance of permanent alimony; the purpose of the intermediary proceeding was to require the respondent to furnish to the plaintiff means for temporary subsistence, for counsel fees, and for suit money. The latter is clearly a separate and independent relief, and requires the entry of a separate judgment.

A similar question arose in the noted case of *Sharon v.*

Sharon, 7 Pac. Rep. 456, and was fully considered by the supreme court of California, in which similar code provisions were construed. The court arrived at the conclusion that a judgment for alimony *pendente lite* was a final judgment or decree, and cited authorities fully sustaining that conclusion. The court say: "A final judgment is not necessarily the last one in an action. A judgment that is conclusive of any question in a case is final as to that question. The code provides for an appeal from a final judgment, not from the final judgment in an action." They say if it is in the nature of a final judgment, and is final upon the question adjudicated in it, the same is appealable. This doctrine is sustained by the supreme court of Kentucky in *Lochnane v. Lochnane*, 78 Ky. 468, and *Hecht v. Hecht*, 28 Ark. 92. These were cases of appeal from orders allowing alimony and counsel fees pending proceedings in divorce. The appeals were sustained in both cases upon the grounds above stated. In *Hecht v. Hecht*, *supra*, the court held that the judgment was not, strictly speaking, an interlocutory one, but a definite judgment, upon which payment might be enforced before final judgment entered in the original cause; that execution might issue thereon, and the money be collected and paid over to the parties before the entry of final judgment in the cause; and even though it should appear that injustice had been done, no relief could be afforded by the final decree. In *Blake v. Blake*, 80 Ill. 523, an appeal was taken from a decree of the circuit court of Cook county "awarding attorney's fees and other expenses in a divorce cause" pending the proceeding for divorce. The court held that it was a money decree, for a specific sum, payable absolutely, which the court had undoubted authority to enforce by the award of execution by sequestration of real or personal estate, or by attachment, if payment was wilfully and contumaciously refused. As to the nature of such decree the court say:

"Such a decree does not seem to us to be merely interlocutory. It is more in the nature of a final decree, and if no appeal lies this case affords an instance of a money decree against a party from which no relief can be had, no matter how unjust or oppressive."

It is further held not to be an answer to the foregoing position that the decree may be reviewed on appeal or error after the final decree in the original cause, since the litigation might be protracted for years, and the defendant in the meantime imprisoned for disobedience to the decree, or subjected to the payment of the sum decreed. It is conceded that alimony is for the immediate benefit of the wife, to enable her to prosecute or defend her suit against her husband on terms of equality, and that the result of the appeal would operate to delay the litigation until the propriety of the decree for temporary alimony and solicitor's fees could be determined in the appellate court; but these considerations are held not sufficient to work a denial of the right of appeal in such case. With respect to the discretionary powers of the court below in such case, it was held that while the trial court, under the statute of that state, has power to award attorney's fees and other expenses in divorce cases, and that the matter is largely discretionary with the court, the supreme court has always assumed jurisdiction to review the action of the court below in regard to allowances for alimony or solicitor's fees; citing *Blake v. Blake*, 70 Ill. 618,—a doctrine which we heartily approve. It is further said in *Foss v. Foss*, 100 Ill. 576, that the allowance of alimony *pendente lite* is discretionary; but it is a judicial, and not an arbitrary discretion which is to be exercised, and that a judgment therefor is subject to an appeal. To the same effect is *Stillman v. Stillman*, 99 Ill. 196. See, also, *Harrell v. Harrell*, 39 Ind. 185. In *Schonwald v. Schonwald*, Phill. Eq. (N. C.) 215, the court, referring to the judge of the court below, say:

"His honor was of the opinion that the allowance of

alimony *pendente lite* was a matter confided to his discretion. In this he was mistaken. Whether the matter set forth is sufficient to entitle the petitioner to a decree for alimony, assuming it to be true, is a question of law; and the discretion confided to the court below is in regard to what is a reasonable amount."

In the case of *Williams v. Williams*, 29 Wis. 517-524, it was held the power of a court in a divorce proceeding to make allowance to the wife for her support and that of her children during the litigation, and for expenses in prosecuting or defending an action, is discretionary with the trial court, but such discretion is to be exercised with reference to all the circumstances of the case which will affect the amount of such allowance, and with due regard to certain rules which are almost universally recognized and applied by the courts in such cases. Such orders are appealable to the supreme court, but they will not be interfered with unless it is apparent that some of the conditions which should have been considered by the court below have been overlooked or disregarded to the manifest injury of either the husband or wife. Appeals from such orders allowing alimony are entertained by the supreme court of the state of Iowa (see *Farber v. Farber*, 64 Iowa, 362; *Wilson v. Wilson*, 49 Iowa, 544), and in several other states appeals are given by statute.

We think the authorities cited lay down the correct doctrine, and consequently hold that the decree or order under consideration is, to all legal intents and purposes, a final judgment, from which an appeal may be prosecuted to this court. This conclusion disposes of the motion to dismiss the appeal, which motion, by stipulation of counsel, was included in the submission of the cause.

Second. Did the court below have jurisdiction, in a cause like this, to enter the judgment or decree for temporary alimony? It must be conceded that the authorities are conflicting upon this subject; and since the

questions of law to be considered have never been decided by this court, we shall feel ourselves at liberty to determine them in such manner as we shall deem most in accordance with the principles of equity, and most conducive to proper practical results, being restrained only by the general rules and principles of law, and by the rules of construction recognized by the decisions of this court.

We will first inquire whether the district court had jurisdiction of the original cause of action. This is a pertinent inquiry, for unless such jurisdiction existed as to the original subject-matter of the action, we would conclude at once that the court had no jurisdiction of the subject of temporary alimony. The failure of the appeal from the order overruling the demurrer to the complaint does not preclude this inquiry, since the question of jurisdiction over the subject-matter of an action may be raised at any time under our practice. The original complaint sets out the articles of separation, and, in substance, alleges that the plaintiff was compelled to execute the same against her will, and under false promises of the husband that they were rendered necessary for a temporary purpose only, and that she would, in a few months, be restored to her marital relations and rights. She incorporates in her complaint copies of letters written to her by the defendant while in the city of New York as evidence of said facts. She states a series of acts of mistreatment which she received at the hands of the defendant previous to the signing of said articles, and alleges that in consequence thereof she was prostrated with serious illness, and was thereby rendered mentally incapacitated to transact the ordinary business of daily life; and that defendant, through his friends and advisers, seized upon this occasion to obtain her consent to a separation. She mentions, among other inducements held out to her by the defendant and his friends and advisers to procure her consent thereto, one

to the effect that he was going to leave America for several years, and that she would be left during his absence in her then penniless and neglected condition previously averred in the complaint. She charges that she was induced to believe that the separation contemplated was only to be for a few months, when she would be restored to her former marital relations; charges that she had been kept ignorant, and was then ignorant, of the value of the defendant's estate, and induced by the representations of the defendant to believe that \$75,000 was as much as half of the value of his estate, whereas it was at that time of the value of \$1,000,000, and is now of the value of \$1,300,000; and that his annual income has been for several years last past, and is now, of the amount of \$150,000.

The articles of separation show that the value of the property conveyed to her was estimated at \$60,000, and that she received \$15,000 in money. She alleges that a portion of the property embraced in the articles of separation did not belong to the defendant in his own right, but, by virtue of a will of his former wife, belonged to his son, and that the defendant was unable, therefore, to give a clear and perfect title thereto to the plaintiff, and that a cloud now rests upon the said parcel of property. She alleges that the property mentioned in the articles of separation was only worth the sum of \$35,000 at the time she received conveyances therefor; and, in this connection, says that by reason of her illness she was unable to ascertain the truth of these matters, and was induced to sign the contract in ignorance of the same, and that she relied upon the representations of the defendant concerning the title to the same, and upon his representation that the separation was only to be a temporary one. Another allegation is that through and by defendant's advice said property has been so mismanaged that it is now not worth more than the sum of \$7,000; that at the present time all of her real estate is incum-

bered, a large part of it for more than it is worth, and all of it is incumbered for as much as can be borrowed thereon. In respect to the money received from the defendant on the execution of the articles of separation, plaintiff says it was all consumed in the support of herself and widowed mother and in defraying other necessary expenses, and that she is now without any money whatever for her own maintenance or to enable her to prosecute this action. She further charges that the contract of separation is void, for the reasons that there never existed any sufficient reason in law to support the same; that the marriage relation between plaintiff and defendant was at all times founded on love and respect; and that defendant's conduct in respect to the separation was the result of undue influence on the part of defendant's friends and advisers; and, as before stated, that fraud and deception were used by defendant in procuring plaintiff's signature thereto.

The prayer of the complaint is that the articles of separation be declared null and void; that the defendant be decreed to pay plaintiff a reasonable sum for support and maintenance during the pendency of this action, and such sums as may be necessary to enable her to prosecute this action, pay solicitor's fees, and defray necessary costs and expenses; also that defendant be made to pay plaintiff \$25,000 yearly for her support and maintenance.

The defendant in his answer denies each and all of the fraudulent acts and conduct charged in the complaint, and alleges that during the brief time of his cohabitation with the plaintiff as his wife she was repeatedly guilty of such gross misconduct and ill treatment of him as to render his life burdensome and intolerable. He alleges that the separation was caused alone by the ill treatment and abuse received by him at the hands of the plaintiff. It is unnecessary here to specify the several denials set up in the answer, since all the material allegations of the complaint charging fraud, mistreatment of the

plaintiff, misrepresentation of facts to induce her to enter into the contract of separation, concealment of the value of his estate, pretenses that he was about to leave the country for years, whereby she would be left in a penniless and destitute condition, pretenses that the separation was to be merely temporary,—a few months only,—and other fraudulent concealments, misrepresentations, and devices, alleged to have been used to induce her to agree to the separation, are positively denied. He alleges that the property conveyed to her was reasonably worth the sum fixed and stated in the articles of separation, and that none of it at that time was incumbered, or under any cloud whatever; denies that the plaintiff was at the time prostrated by illness, or mentally incapacitated to do business, and alleges that she was fully informed of the value of the property conveyed to her; that she took time for the consideration of all matters connected with the separation, and was assisted therein by competent and able legal counsel. He positively denies that by his advice the real estate became incumbered or mismanaged, or that the articles of separation have in any way been rendered null and void by subsequent promises or acts of the defendant; and alleges that the fortune settled upon the plaintiff at the time of the separation was amply sufficient to support her in a handsome manner during her entire life.

We have thus given the substance of the defense, as well as the charges contained in the complaint. As will subsequently appear, however, but few of the averments of the defense can be considered upon the questions involved in this appeal.

When a question of jurisdiction is submitted to us, it is not our province to prejudge a cause of action by inquiring into and passing upon the merits of the original controversy. The general rule for ascertaining whether a court has jurisdiction of a certain subject-matter is by inspection of the original complaint. If the original

complaint states upon its face a case for relief coming within the equitable jurisdiction of a *nisi prius* court, this is the limit of our inquiry, especially in a case like the present, where issues of fact are joined upon the pleadings filed in the original action, and the appeal pending in this court is taken from an intermediary decretal order made in the case. It would be highly improper for us to investigate and prejudge the merits of such original controversy upon the allegations, charges and counter-charges contained in the several pleadings filed in the main case.

It is contended by defendant's counsel that no relief can properly be granted under said complaint, since the allegations thereof disclose facts which operate to defeat the jurisdiction of the court to entertain the cause. The principal ground of relief prayed for is that the defendant be decreed to pay the plaintiff an annual sum of money for maintenance and support. Another and preliminary ground of relief asked for is the annulling of the articles of separation. It is contended by counsel for defendant that the plaintiff's complaint is not sufficient in law to confer jurisdiction upon the district court, and for that reason that an order for alimony *pendente lite* cannot be sustained.

The grounds assigned for failure of jurisdiction are (1) that a suit for alimony alone cannot be maintained in this state, since the statute only authorizes alimony as an incident to proceedings for divorce; (2) that the articles of separation interpose an insurmountable obstacle to the jurisdiction of the court to award permanent alimony, for the reason that the same are *prima facie* good and binding until set aside by the decree of a court of competent jurisdiction.

Another objection assigned to the jurisdiction of the court is that alimony can only be granted under our statute as incident to a proceeding for divorce, and that no divorce is prayed for in this case. It is true that the

statute of this state makes no provision for alimony except as an incident to proceedings for divorce; but this statute does not, we apprehend, preclude our courts from granting alimony, either temporary or permanent, in a proper case, although a decree for divorce may not be included in the relief prayed for. As said in *Galland v. Galland*, 38 Cal. 265, the legislature was not dealing with the general subject of alimony, as an independent subject-matter of legislation, but only as one of the incidents of an application for divorce. The same court holds that the subject of alimony comes within the general powers of a court of equity, independently of the statute. This view of the jurisdiction of courts of equity to grant alimony in the nature of maintenance to a wife, unconnected with proceedings for divorce, was taken by the supreme court of Alabama in the recent case of *Hinds v. Hinds*, 22 Cent. Law J. 308, which affirms the doctrine laid down in *Glover v. Glover*, 16 Ala. 440. The conclusion there announced was that courts of equity exercised a jurisdiction over the subject of alimony, not merely incidental, but original, in cases where the wife's right to a maintenance existed. The same doctrine is maintained in *Purcell v. Purcell*, 4 Hen. & M. 507. In the case of *Glover v. Glover*, *supra*, the court say: "The broad ground upon which the jurisdiction is made to rest is the unquestioned duty of the husband to support the wife, and the inadequacy of legal remedies to enforce this duty." The same doctrine exists in Mississippi, as appears by the late case of *Verner v. Verner*, 62 Miss. 263. Campbell, C. J., in delivering the opinion of the court, says: "It is settled in this state that a wife denied support by her husband may bring her bill for alimony without seeking a divorce."

The second ground of objection is that the articles of separation are *prima facie* valid until set aside by decree of a court of competent jurisdiction. Conceding this proposition to be true, it does not necessarily divest the

court of jurisdiction to inquire whether the articles of separation were fairly entered into, and without any imposition being practiced upon the wife. The allegations of the complaint raise the question of fact whether the articles of separation are valid or not. The law concerning the contract of separation, and the execution of articles to effect the same, is strict, and requires the utmost good faith on the part of the husband.

The law upon this subject seems to be pretty well settled, and is to the effect that the transaction must be untainted by fraud, and the contract must be, in all respects, fair, reasonable and just, taking into consideration the circumstances of the parties. The wife must be in a position to act with perfect freedom, and with full knowledge of all the circumstances and conditions which enter into the transaction, and with full knowledge of her rights, and that the contract makes sufficient provision for the maintenance of the wife according to the *status* of the parties. *Switzer v. Switzer*, 26 Grat. 574; *Miller's Ex'r v. Miller*, 16 Ohio St. 527; *Randall v. Randall*, 37 Mich. 571. Some authorities cast upon the husband, when the validity of such a contract is questioned, the burden of showing that the contract was a fair and equitable one, and that it was entered into by the wife with full knowledge of all facts likely to influence her action in the matter.

The present *status* of the main case, upon the pleadings in the district court, presents the question of the validity of the articles of separation as a question of *fact*, to be determined by that court. This being the *status* of the original cause of action, it would be improper for us to go further than may be necessary to determine the single question of jurisdiction, which, as previously stated, is essential to the authority of the court to award alimony *pendente lite*. The question of jurisdiction to entertain the complaint is to be determined by

an inspection of the complaint itself. Upon inspection of this pleading we find it specially charges that the plaintiff was coerced to execute the articles of separation against her free will and consent, under circumstances, and by resort to expedients, which, if established by proof, would render the articles null and void, by all the authorities upon the subject. Whatever the real facts may be, the allegations of the complaint are sufficient to authorize a court of equity to assume jurisdiction for the purpose of investigating the grievances alleged, and for administering proper relief if the same should be susceptible of proof. The law does not recognize in contracts of this nature any special sanctity relieving them from the general rule applicable to contracts, that fraud vitiates all contracts. On the contrary, they are rather regarded as deeds or agreements entered into by and between persons occupying fiduciary relations to each other, wherein full knowledge and the free will and consent of the weaker party, and good faith and fair dealing on the part of the stronger party, are essential to their validity. These views are sustained, both by reason and authority, as will appear from the foregoing authorities and the cases cited therein.

The question of jurisdiction being decided in the affirmative, it only remains for us to decide the *third* and last point, viz., is the order or decree awarding temporary alimony a valid decree? This must be determined upon the same rules and principles applicable to orders or decrees for alimony *pendente lite* in other cases. The rule in all cases is based upon the existence of the marriage relation, the ability of the husband, and the destitute circumstances of the wife. If the wife presents such a case against her husband as *prima facie* entitles her to relief, the rule is that she should be supplied with the necessary means to prosecute her suit on an equal footing with her husband; also, if she be destitute of the means of subsist-

ence, and the husband is possessed of means to relieve her necessities, it is the duty of the court, when called upon, to award a reasonable allowance for this purpose. A proper showing should be made by the wife to entitle her to such an order. Her petition praying for such temporary alimony should be verified and supported by affidavits; but the merits of the original or main controversy cannot be inquired into. The essential facts to be established are, as before stated, the existing marriage relation of the parties, the present destitution of the wife, and the financial ability of the husband. If the wife is in fact destitute of the means of support, it is immaterial, so far as the application for temporary alimony is concerned, what brought about her destitute condition. The only questions upon which the husband can be heard are his own means and the means of the wife. If it should be shown that the wife is possessed of the necessary means, her application should be denied. See *Galland v. Galland*, 38 Cal. 265; *Porter v. Porter*, 41 Miss. 116; *Garland v. Garland*, 50 Miss. 694; *Frith v. Frith*, 18 Ga. 273; *Verner v. Verner*, *supra*; *Foss v. Foss*, *supra*; *Jenkins v. Jenkins*, 91 Ill. 167; *Platner v. Platner*, 23 N. W. Rep. 764, and cases cited; *Culver's Ex'r v. Culver*, 8 B. Mon. 128. Under the rule announced we cannot examine the defense set up by the husband against the allowance prayed in the wife's petition. In it he neither denies his own financial ability to provide temporary support and suit money nor the alleged necessities of the plaintiff. The fact that he made a liberal provision for her a comparatively short time ago, which she has squandered, does not answer the allegation that she is now destitute, which latter fact is alleged in her petition and supported by her own and other affidavits.

Our conclusion upon this final question is that the district court had lawful authority to award alimony and suit money *pendente lite*, and that the discretion of the court respecting the sums so awarded was not abused, but, con-

sidering all the circumstances bearing upon the question, the allowances made were reasonable. The decretal order appealed from is therefore affirmed.

Affirmed.

DENVER & R. G. R'y Co. v. COBLEY.

It is not error to allow the plaintiff to dismiss his own case, where no counter-claim has been interposed.

Error to District Court, Fremont County.

THIS action was brought against the railway company by the defendant in error to recover damages for injuries received by him as a passenger in one of the railway company's coaches while being carried therein from Pueblo to Canon City. A demurrer was sustained to the original complaint, whereupon the plaintiff filed an amended complaint, which the railway company answered, setting up facts showing that the accident occurred by reason of the plaintiff's negligence in resting his arm on the sill of a car window, allowing the arm to protrude outside the car in which he was riding, and that while remaining thus exposed it came in contact with a freighter's wagon standing near the track, by reason whereof the injury occurred. A default was entered against said plaintiff for failure to file a replication to the defendant's answer within the time prescribed by the court. Counsel for the railway company thereupon moved for judgment on the pleadings. When this motion was called up for hearing the plaintiff moved the court to dismiss his said suit without prejudice. The latter motion was allowed, and the suit dismissed without prejudice, to which action of the court the company, by its counsel, excepted. To reverse this order the railway company sued out this writ of error.

Messrs. MACON and HOBSON, WOLCOTT and MILBURN, and Mr. JOHN M. WALDRON, for plaintiff in error.

BECK, C. J. One of the errors assigned is "that the court below erred in dismissing the cause as it stood upon the pleadings without consent of defendant company; but said cause should have been allowed to go to the jury, and be finally determined upon the facts proved and admitted." The court below committed no error in dismissing the action upon the plaintiff's motion. The Code of Civil Procedure provided, then as now, that an action might be dismissed, or a judgment of nonsuit entered, by the plaintiff himself, at any time before trial, upon payment of costs, if a counter-claim had not been made. Code Civil Proc. p. 48, § 147. The motion of plaintiff to dismiss his suit was made and the suit was dismissed before trial. It was likewise dismissed, as shown by the order of dismissal, "upon payment of all costs accrued herein." The plaintiff was entitled, as a matter of right, to this order. *Hancock Ditch Co. v. Bradford*, 13 Cal. 637; *Plant v. Fleming*, 20 Cal. 93. The above-cited cases arose upon a similar code provision, and are decisive of all the questions presented by the assignment of errors.

It was within the discretion of the court to dismiss the plaintiff's suit without prejudice. Judgment affirmed.

Affirmed.

MARTIN V. McLAUGHLIN.

1. After a case has gone to trial, a motion to strike defendant's answer from the files comes too late.
2. A defendant has a right, notwithstanding his default in the county court, to file his answer in the district court upon the appeal. Gen. St. § 500.
3. Before a common carrier may sell, under the statute, perishable freight to satisfy charges thereon, he must give the owner or consignee, or the agent of either of them, at least twenty-four hours' notice previous to such sale.

Error to District Court, Park County.

ON REHEARING.

This case was originally brought in the county court of Lake county, where judgment by default was rendered against the defendant. The defendant appealed to the district court of Lake county, and filed therein his answer to the complaint. A change of venue was taken to Park county, where a continuance of the case was had on motion of the plaintiff. At a subsequent term, when the case was called for trial, and after the jury had been called, a motion was made by the plaintiff to strike out the answer on the ground that the defendant, being in default for failure to answer in the county court, could only answer thereafter by leave of court. The court denied the motion on the ground that it came too late, and could not be interposed after the case had gone to trial. This ruling is assigned for error.

The plaintiff in his complaint avers, in substance: *First*, that the defendant was a common carrier of goods for hire, between the town of Grant, the then terminus of the Denver & South Park Railroad, and the town of Leadville. *Second*, that on the 21st of December, 1878, the said railroad, at said named terminus, delivered to the defendant a certain lot of goods, which are particularly described, consisting of dressed poultry, fish and oysters, of the value of \$329.44, the property of the plaintiff, which goods the defendant received, to be by him safely carried to the town of Leadville, and to be delivered to one McCarter, the consignee, for reasonable reward, to be paid by said McCarter, "the said goods having been shipped to him as purchaser thereof." *Third*, that the defendant did not safely carry and deliver the goods; that he carried the same to said town of Leadville, and tendered them to said consignee, who refused to receive or accept the same, or any part thereof; and that thereupon the defendant sold said goods and

appropriated the proceeds to his own use, without first having notified the owner and consignor, the plaintiff, that the freight on said goods was unpaid, although he well knew said consignor, and where he lived, and without having given or published the required statutory notice of such sale. *Fourth*, that the defendant so sold and disposed of said goods and appropriated the proceeds as aforesaid without first having given the owner or consignor or the consignee thereof, his or their agent, notice of his intent so to do twenty-four hours before said sale was to have taken place; and that said consignee did live at the place or town where said goods were sold; and that the defendant did not sell said goods, or any part thereof, at public auction to the highest and best bidder; and did not sell the same, or any part thereof, for the best price that could reasonably have been obtained in the market where they were sold, and at the time they were sold; and that said defendant did not dispose of the proceeds of said sale as provided for in section 1865 of the General Laws of the state of Colorado. Wherefore plaintiff demands judgment, etc.

The defendant in his answer admits that he was a common carrier, and received goods at the time and place averred, but does not know whether the plaintiff was at that time the owner of said goods or not; denies all the other allegations of the complaint; and, further answering, sets up the following as a further defense, to wit:

“That prior to the delivery of the goods to him as aforesaid he contracted with one Joseph McCarter, the consignee and purchaser of said goods, to receive said goods from said railroad company at a station known as Grant, at the end of said railroad company’s track, and to safely carry and deliver said goods to the said Joseph McCarter, at the town of Leadville, in the county of Lake, and state of Colorado, for a certain reward previously agreed upon to be paid by said McCarter; that

under and by virtue of said contract he did receive from the said railroad company, at said Grant station, after first paying all charges thereon, the said goods; that on the 24th day of December, A. D. 1878, he did safely carry said goods to the said town of Leadville, and tendered and offered to deliver them, and each and all of them, to the said consignee, Joseph McCarter; that the said McCarter did absolutely refuse to receive or accept said goods, or any part thereof; that said goods, and each and all of them, did consist of goods which would perish or become greatly damaged by delay in disposing of the same; that the freight on said goods was unpaid; that the consignor of said goods was not known to this defendant; that the defendant thereupon notified the said consignee personally that he would, in twenty-four hours from the time of such notice, sell all of the said goods at private sale for the best price that the same would bring, or that could reasonably be obtained therefor, in the said town of Leadville; that the defendant did, twenty-four hours after such notice, sell and dispose of the same at private sale for the best price that could reasonably have been obtained therefor in the market where they were sold, and at the time they were sold; and that after paying the freight and all charges thereon no surplus was left. Wherefore defendant prays that he may be dismissed," etc.

Replication stricken from the pleadings. Verdict and judgment for defendant.

Section 6 of "An act concerning unclaimed freight" (Gen. Laws, 647) provides for the sale of perishable goods by the carrier, commission merchant or warehouseman unless the charges on such goods are paid, and they are claimed and taken away; "provided, always, that before any such sale is made, notice shall be given to the owner or consignee, or agent of him, of the intent to sell and dispose of such goods, merchandise or other property, and the time and place of such sale, either by personal

notice or by letter addressed and properly mailed to him, which said notice shall be given at least twenty-four hours before said sale, if the consignee or owner, or agent of him, so notified shall reside at the place where such goods are; but if the person to be so notified of such sale reside at a distance, then the time of such sale shall be so appointed in such notice as to allow him, in addition to the twenty-four hours above mentioned, a reasonable length of time to claim such goods or to attend such sale; and if, upon reasonable inquiry, the residence of such consignee, owner or agent cannot be learned, then, upon the affidavit of such carrier, commission merchant or warehouseman, or some person in his or their behalf, to be filed and preserved by the carrier, commission merchant or warehouseman, and by them to be produced and exhibited to any person claiming an interest in the goods sold, or to be sold, as aforesaid, such goods, merchandise and other property may be sold as aforesaid without notice."

Messrs. D. J. HAYNES and MATT. ADAMS, for plaintiff in error.

Messrs. M. J. BARTLEY, R. D. THOMPSON and JOHN C. FITNAM, for defendant in error.

ELBERT, J. The court properly overruled the plaintiff's motion to strike the defendant's answer from the files. The motion came too late, being interposed after the case had gone to trial. An additional ground is found in the statute providing for appeals from the county to district courts, which declares that the proceedings in such case in the appellate court shall be *de novo*, and that the defendant, where judgment had been rendered by default, shall have the right to plead any and all defenses which he might have pleaded had the case originally been brought

in the district court. Gen. St. § 500. As this statute gave the defendant a right to file his answer in the district court, notwithstanding his previous default in the county court, it was not necessary to ask and obtain leave of the court therefor.

The ruling of the court striking the plaintiff's replication to the defendant's answer from the pleadings is not assigned for error. We notice it only to say that a mistaken view of the effect of the ruling perhaps led to the erroneous result which we find. It will be seen that all of the material allegations of the complaint are put in issue by the denials of the answer. "The further defense," as it is called in the answer, is largely a repetition in another form of matter already in issue. A replication was necessary only in so far as the answer alleged new matter, and this was all that stood admitted when the replication was stricken from the files. Whether the statutory notice was given by the defendant was one of the issues made by the averments of the complaint and the denials of the answer, and no replication was needed to complete it.

We need not inquire into the sufficiency of the evidence to show that the defendant knew that the plaintiff was the owner and consignor of the goods and that he resided in Denver. The evidence shows clearly that he knew the consignee, and knew that he resided in and had a place of business in Leadville, the place of delivery. We are unable to find in the bill of exceptions any evidence showing that the defendant, prior to the sale of the plaintiff's goods, gave to either the owner or consignee, or to the agent of either of them, the twenty-four hours' notice required by the statute in a case of sale of perishable goods for charges, etc. There does not appear to have been any attempt or effort on the part of the defendant or his agents to comply with the statute in this respect. On the other hand, it appears from the evidence that the sale

took place in less than twenty-four hours after the consignee refused to receive the goods.

The verdict is manifestly against the evidence, and for this reason the judgment of the court below must be reversed, and the cause remanded.

Reversed.

WELLS ET AL. V. COE.

1. In the purchase of safe machinery and appliances the master is required to exercise ordinary care and diligence, such care and diligence being proportioned to the dangers of the service.
2. The master is likewise charged with the exercise of ordinary care and diligence in keeping the machinery and appliances in suitable condition for use; such care having reference, also, to the dangers of the service.
3. Agents charged with the duty of procuring machinery, or with the duty of inspecting and keeping the same in suitable repair, are not to be regarded as fellow-servants with employees laboring in the business where such machinery is used.
4. The duty of the master, however, does not amount to an absolute guaranty of perfection in the machinery or appliances. For injuries produced through latent defects in the machinery, or through defects which the requisite skill and watchfulness had failed to detect or foresee and avoid, the master is not answerable.
5. Where injury is suffered by a servant through defects in the machinery furnished, if the servant knew or had means of knowledge equal to that of his employer concerning such defects, yet continues in the service, he cannot recover, provided no inducement relating to the danger led him to remain.
6. If the plaintiff so far contributes to the injury by his own conduct as that, but for such conduct, the injury would not have been received, he cannot recover.

Appeal from District Court, Lake County.

THIS action was brought in the district court by appellee, under section 1031 of the General Statutes. Her husband, Robert H. Coe, was employed by appellants upon a certain mine belonging to them in Lake county. While in the discharge of his duties, Coe was struck and

9	150
11	7
9	150
14	197
9	150
15	200
16	50
16	226
9	150
17	194
17	284
9	150
20	331
9	150
21	334
22	412
5a	524
6a	351
9	150
23	172
23	306
9	150
26	24
26	288
14a	530
9	150
18a	228
9	150
34	106
20a	201
20a	311
9	150
35	567
36	273
137	398

killed by a bucket used to hoist earth and water, descending in the shaft wherein he was working. The proximate cause of the accident was the breaking of a brake-rod and slackness of a tight belt forming a part of the hoisting apparatus. Appellee averred, and attempted to establish, negligence on the part of defendants in the purchase or in the repairing of the machinery in question. Appellants denied such negligence on their part, and averred, and sought to prove, contributory negligence on the part of Coe. The verdict and judgment were for appellee, fixing her damages at the sum of \$5,000. The remaining matters necessary to a full understanding of the opinion are stated therein.

Messrs. MARKHAM, PATTERSON and THOMAS, for appellants.

Messrs. T. A. DICKSON and L. B. WHEAT, for appellee.

HELM, J. Appellee, who was plaintiff below, bases her right to recover in this action upon the ground that the death of her husband was caused by defective machinery or appliances, in the purchase or repairing of which defendants below did not exercise the degree of care required by law. The following legal propositions relating to the subjects of negligence and contributory negligence are deemed pertinent to the case:

First. In the purchase of safe machinery and appliances for use in his business, the master is required to exercise ordinary care and diligence; such care and diligence having reference to the hazards of the employment, and being proportioned to the dangers of the service. If, through the want of ordinary care in this respect, unsafe or defective machinery is procured, and the servant, without fault on his part, is thereby injured, the master is liable. *Colorado Cent. R. R. v. Ogden*, 3 Colo. 499; Beach, Neg. § 123.

Second. The master is likewise charged with the fur-

ther duty of maintaining in suitable condition the machinery and appliances used in his business. In this regard he is also required to exercise ordinary care and diligence, and is liable for injuries, resulting from his ordinary negligence, to the servant, without fault on the latter's part; the question as to what shall constitute such ordinary care having reference likewise to the danger which the service naturally imposes upon the employee. *Hough v. Railway Co.* 100 U. S. 213; *Beach, Neg.* § 124.

Third. Agents charged with the duty of procuring safe machinery, or agents charged with the duty of inspecting and keeping machinery and appliances in suitable repair, are not to be regarded as fellow-servants with those employed to labor in the business wherein such machinery or appliances are used, or, in some cases, even with those engaged to operate the same. The master is liable for injuries resulting, without contributory negligence, to other servants, through the ordinary negligence of his employee or agent thus charged with the duty of procuring or repairing, whether such negligence be in originally failing to purchase safe machinery or appliances, or in failing to keep the same in proper condition for use. *Ford v. Fitchburg R'y Co.* 110 Mass. 241; *Whart. Neg.* §§ 211, 212. Also *Hough v. R'y Co. supra*, and cases cited; *Wabash R'y Co. v. McDaniels*, 107 U. S. 454; *S. C. 2 Sup. Ct. Rep.* 932; *Brann v. Chicago, R. I. & P. R. Co.* 53 Iowa, 595; *S. C. 6 N. W. Rep.* 5, and cases cited; *Chicago N. W. R'y Co. v. Swett*, 45 Ill. 197; *Shanny v. Andros-coggin Mills*, 66 Me. 420.

But to the foregoing general doctrines there are some qualifications and exceptions, two of which will be mentioned: (a) This duty, however, on the part of the master, either in purchasing machinery and appliances, or in keeping the same in suitable condition, does not, as to the employee, amount to a warrant of perfection therein, or a guaranty of absolute safety under all circumstances

in the use thereof. Having exercised ordinary care in providing and keeping in repair the machinery used, the master's duty in the premises is discharged and his liability ended. For injuries produced through latent defects not discoverable by inspection, or by the usual and ordinary tests, or through defects which the requisite skill and watchfulness have failed to detect, or foresee and avoid, he is not answerable. See cases *supra*; *Wilson v. Denver, S. P. & P. R. Co.* 7 Colo. 104; *Toledo, P. & W. R'y Co. v. Conroy*, 68 Ill. 567; *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 565; Whart. Neg. § 212; Beach, Neg. §§ 126, 133. (b) Where injury is suffered by an employee, through defects in the machinery or appliances furnished by his employer and used in the business, if the employee knew, or had means of knowledge equal to that of his employer, concerning such defects, yet continued in the latter's service, he cannot recover; provided no inducement, such as a promise to cure the defect, and thus remove the danger, led him to remain. The means of knowledge possessed by agents in cases covered by the third general rule above named are, of course, those of the principal or employer. *Hayden v. Smithville Manuf'g Co.* 29 Conn. 548, and cases; *McGlynn v. Brodie*, 31 Cal. 376, and cases cited; *Greenleaf v. Illinois Cent. R. Co.* 29 Iowa, 14; *Stone v. Oregon City Manuf'g Co.* 4 Or. 52; *Mad River & L. E. R. Co. v. Barber*, *supra*; *Wright v. New York Cent. R. Co.* 25 N. Y. 562; *Central R. R. & B. Co. v. Kenney*, 58 Ga. 485. See, also, *Davis v. Detroit & M. R. Co.* 20 Mich. 105; *Texas & P. R'y Co. v. Scott*, 64 Tex. 552; Story, Ag. § 453, *h*; Beach, Neg. § 133.

The reason for this exception is self-evident. If, with knowledge, or with means of knowledge equal to his employer's, of defects in the machinery, the servant, without remonstrance, voluntarily continues in the service, a waiver of his claim for damages is said to have taken place, or his conduct is regarded as negligence con-

tributing to the resulting injury. It is to be observed, however, that caution should be exercised in applying this rule to defenses where the employee's *equal means of knowledge* is the ground relied on. The nature of his employment, including his duties and responsibilities; the character of the machinery or appliance in question, and the acquaintance therewith he could reasonably be expected to possess; the proximity and relation of such machinery or appliance to his daily labors; the frequency of his opportunities for observation,—these and other matters, including, of course, the reasonable skill and ability which he guaranties by engaging in the service, may each or all enter into an appropriate consideration of the subject. And the conclusion reached, when this question is presented, must depend largely upon the peculiar facts and circumstances connected with each particular case.

It will be noticed that these propositions of law all recognize the doctrine of contributory negligence. This doctrine, as sanctioned in Colorado, is defined as follows: "If the plaintiff, or party injured, by the exercise of ordinary care, under the circumstances, might have avoided the consequences of the defendant's negligence, but did not, the case is one of mutual fault, and the law will neither cast all the consequences upon the defendant, nor will it attempt any apportionment thereof." *Colorado Cent. R. Co. v. Holmes*, 5 Colo. 197; Cooley, Torts, 674. Again, in *Colorado Cent. R. Co. v. Martin*, 7 Colo. 592: "One of the well-known and well-settled principles of the law upon the subject of negligence is that when the plaintiff so far contributed to the disaster by his own neglect, or want of ordinary care and caution, that but for such neglect, or want of care and caution, on his part, the misfortune would not have happened, he is not entitled to recover."

A brief examination of the record before us, in the light of these legal principles, discloses the fact that at

least one error was made by the district court which is fatal to the judgment there entered.

The following facts clearly appear in evidence, and are practically uncontradicted, viz.: Coe represented himself, and was represented by others, to be a skilled and experienced miner,—a person competent to take charge of men and sink shafts, or do anything else usual and needful in the business of mining. Relying upon his qualifications in this respect, he was selected by defendants to fill the position of “foreman and boss of workmen,” and paid \$4 per day. Neither of the defendants was to be regularly on the ground, and in their absence Coe had entire charge, except only as to the matter of hiring and discharging workmen, upon which subject the record is silent. His authority at the mine was plenary, save, perhaps, at such times as defendant Wells might happen to be present. The other employees, including the engineer and brakeman, were instructed to obey his orders. The working of the machinery and appliances was under his control. They were put in motion or stopped at his command, and he determined the manner in which they should be operated “as to time, speed,—anything that might occur.” It was the engineer’s duty to make repairs, but Coe could order them made, and the engineer was bound to obey. Coe conferred with defendant Wells as to the general plan of operation, but in the latter’s absence determined when and how each particular part of the work should be performed. It was by his orders that the door placed upon the shaft for the purpose of preventing just such casualties was removed; and it was under his directions that at the time of the accident, water was being hoisted while he was in the unpartitoned and uncovered shaft, upwards of two hundred feet below the surface, engaged in “chinking out the water streak.”

In view of these and other established facts, we hardly think it could be correctly said that Coe was under no obligation to examine or inspect such parts of the ap-

pliances used in hoisting as the brakes and belting; nor did he himself take such a view of his duties. It is shown by the testimony that upon entering defendants' service he made a careful examination of the machinery and appliances,—especially the brake; that he declared the brake to be the principal thing about a shaft, and asserted his determination never to go down one where he suspected any deficiency in this part of the machinery; and that he expressed himself as well satisfied with the machinery and appliances provided by defendants, specifically mentioning the brake.

In referring above to certain facts as established, we make full allowance for the probable effect upon Tyndal's testimony at the trial produced in the minds of jurors by the evidence of White and Brown. The copy of Tyndal's sworn statement before the coroner, offered in rebuttal, corroborates his testimony at the trial concerning Coe's remarks about the brake. This statement was made the day succeeding the accident, and being introduced by plaintiff, the jury probably believed its contents. But nearly all the facts now under consideration are drawn from the testimony of Wells and Kipp, as well as that of Tyndal.

From the foregoing conclusion, based upon the evidence, it follows that in one respect the charge is seriously misleading. The second, fourth and sixth instructions given on behalf of plaintiff, while stating the law correctly in a proper case, might well have led the jury to an erroneous verdict in the one at bar. By these instructions the jury were substantially informed that Coe was under no obligation to notice the machinery or appliances, or give any attention whatever to their condition and safety. The law, as we have seen, is otherwise. The servant must possess a "fair measure of skill for the service he undertakes." It is his duty to use ordinary care in informing himself of the dangers and responsibilities attending his employment, and to take

the same degree of care in avoiding accident and injury. This duty on his part is said to be correlative to the master's duty of employing a like measure of care for the servant's protection and safety. Moreover, the servant's duty in this regard, like that of his master, is a continuing one. He may not close his eyes to serious defects or weaknesses in machinery or appliances, occasioned by use, of which, considering his employment, he might reasonably take notice; and he may not forget or omit precautions which, under the circumstances, as a reasonable and prudent man, he ought continually to exercise. The failure of the servant to employ ordinary diligence and care in these respects is at his peril. If but for such want of ordinary diligence or care the injury would not have been received, he is guilty of contributory negligence, and is denied relief. For this error in the charge the judgment must be reversed.

The submission for defendants of instruction numbered 7½, if it can be considered as correctly and fully covering this subject, would not cure the error mentioned. There is no way of determining that the jury ignored the obvious and erroneous view expressed in a portion of the charge above referred to, and accepted another part thereof containing a proper statement of the law. *Clare v. People, ante, p. 122.*

But there is another proposition which may be equally decisive upon the question of reversal. The evidence above cited shows this to be a case wherein the rule concerning knowledge, or means of knowledge, of an employee as to the defects producing an accident, might, had it been properly stated to the jury, have produced a different verdict. Coe had been on the ground, in charge of the business, for upwards of a week. He must frequently have seen all the hoisting apparatus. By his words and conduct he had shown that he considered himself capable of passing judgment upon the sufficiency of the brake; and no special training or peculiar skill,

other than that of an experienced miner, was required to know whether or not the tight belt was adequately protected from the weather, and whether or not, at any particular time, it was too slack to perform its work. If the accident was due to a latent defect in the brake-rod, not discoverable by inspection or by the usual tests, plaintiff could not recover. If it arose from visible or apparent defects in the rod or belt, or both, Coe's means of knowledge thereof, considering the nature of his employment and his avowed qualifications, might, by the jury, under proper instructions, have been found more than equal to the means of knowledge possessed by defendants; and if this were true, plaintiff could not recover. Yet the instructions for plaintiff above mentioned practically told the jury that Coe's means of knowledge concerning the defects which are said to have caused his death could not influence their verdict.

The judgment is reversed and the cause remanded.

ELBERT, J., did not participate in this decision.

MULLEN ET AL. V. WINE.

1. Where an action of forcible entry and detainer has been so altered, by striking out a part of the complaint, as to resolve it into an action for possession and damages, and the appellee obtained, and is maintaining, a decree obtained in the latter form, he cannot object that, being originally framed as an action of forcible entry and detainer, the court has no jurisdiction on appeal.
2. Judgment by default, without a rule to answer, should not be entered against a defendant, where a motion to strike out a portion of the complaint has been allowed.
3. Where the character of the action has been changed by striking out some portion of the complaint, there should be an actual amendment of the complaint in accordance with the provisions of section 58 of the code.
4. As a matter of good practice, an order to strike out should specify particularly and correctly the matter to be stricken from the pleading.

Appeal from County Court, Gunnison County.

THE facts are stated in the opinion.

Messrs. THOMAS, McDOUGAL and THOMAS, for appellants.

Mr. J. F. FRANKEY, for appellee.

ELBERT, J. 1. It is objected by counsel for appellee that this is an action of forcible entry and detainer, and that no appeal lies from the county court to this court, under the forcible entry and detainer act. Gen. St. 501. A perusal of the complaint leads to the belief that the pleader intended to state a case of forcible entry and detainer, but the court below treated the action as *admittedly* under chapter 23 of the code, entitled "Actions for Possession and Damages." If the plaintiff insisted upon his action of forcible entry and detainer, we see no *legal* reason for the ruling of the court sustaining the motion to strike from the complaint the words "with force and arms," and the words "forcibly" and "forcible." The plaintiff, however, is not here questioning this ruling, but insisting upon a judgment rendered upon his complaint as it stood after the ruling was made. The effect of striking out the words specified was to destroy whatever pretensions the complaint had as a complaint of forcible entry and detainer, and to leave the action one for "possession and damages," under the chapter named. This is the action which the plaintiff prosecuted to final judgment. The subsequent proceedings show a trial under this chapter. The trial is to the court, and the findings and judgment are in accordance with the provisions of section 273, and a "special execution in the nature of a writ of possession" is awarded, in accordance with the provisions of section 275, Amended Code, 86. Neither the complaint nor the findings support a judgment of

forcible entry and detainer. The objection must be overruled.

2. After the motion of the defendant to strike out was sustained, judgment by default was entered against him without a rule upon him to answer. This was error. Both the demurrer and the motion to strike out prevented a default, under the provisions of chapter 10 of the code. The demurrer was overruled, but the motion to strike out was subsequently entertained and allowed. We find no provision of the code authorizing a judgment by default, under such circumstances, in the absence of a rule to answer. We think the defendant should be regarded as standing in the same position as though he had successfully attacked the complaint by demurrer. Even if the order of the court and the circumstances of the case required no formal amendment of the complaint, the necessity for a rule to answer would remain the same.

3. The code makes no provision for the amendment of a pleading where some portion of it, or certain words contained in it, are stricken out on motion. In many cases the effect of such an order would be to reform the pleadings without more. But, in this case, as the character of the action was changed, we are of the opinion that there should have been an actual amendment to the complaint, in accordance with the provisions of section 58 of the code.

4. The order specifies imperfectly the words to be stricken out, and counsel were remiss in not seeing to it that it was properly entered. The intention of the court, however, is reasonably plain. The motion specifies the objectionable words, and the line and page where they occur. This motion was "sustained," and the words "force, and force of arms," "described in said motion," were ordered stricken out. This was substantially an order of the court to strike from the complaint the words "described in said motion;" and as the motion was specific, the pleader would have found no difficulty

in complying with the order. As a matter of good practice, however, such an order should specify particularly and correctly the matter to be stricken from the pleading. Judgment reversed.

Reversed.

9	170
30	530
9	170
12a	33

LAUGHLIN ET AL. V. HAWLEY.

1. Under Gen. St. §§ 53-60, pp. 266, 267, a lien upon the real estate of a judgment debtor is created by filing a transcript of a judgment from a justice of the peace with the county clerk and recorder, no duty being placed upon the recorder to index and record such transcript.
2. Where the description of the property contained in the sheriff's return of levy, and other documents following thereon, is in such general terms as to call for evidence *dehors* the writing, parol evidence is admissible to apply it to the subject-matter, and thereby clear up any uncertainty; and if from such evidence it appears that the terms used, as commonly understood in the neighborhood, clearly designate the property levied upon and sold, the description must be regarded as sufficient.

Appeal from County Court, Gilpin County.

THE complaint alleges that the amount in controversy does not exceed \$200; that on the 18th day of July, A. D. 1876, Benjamin Lake and Henry J. Hawley recovered a judgment against one Alfred Rollins, before Harley B. Morse, a justice of the peace in Gilpin county; that on the 24th day of January, A. D. 1877, an execution was issued thereon, delivered to a constable of said county, and on the 25th day of February, A. D. 1877, the same was returned indorsed that no property could be found to satisfy the same; that on the 9th day of December, A. D. 1880, a transcript thereof was filed in the office of the clerk of the district court of Gilpin county, and recorded in a book kept therein, as required by law; that on the 12th day of May, A. D. 1881, an execution and fee-bill issued thereon to the sheriff of said county; that on the

16th day of June, A. D. 1881, the sheriff levied the same on the following described property, to wit: a certain ranch claim situate in the North Fork of Elk Horn gulch, Gilpin county, Colorado, and containing eighty acres of land, being the same property formerly owned by one John Eicher, and purchased by him from one Stacy, and conveyed to said Rollins by said Eicher, together with the one-story frame and log house, board fence, and all the improvements thereon; that said sheriff levied the same on all the rights, title and interest that said Rollins had in said land, on the 18th day of April, A. D. 1879, under and by virtue of a judgment lien had under and by virtue of filing a transcript of the said judgment with the clerk and recorder of said county on the 18th day of April, A. D. 1879; that on the 17th day of April, A. D. 1879, the said Rollins was the owner of, and in possession of, said property, and entitled to own and occupy the same by law, and by virtue of his purchase from said Eicher; that the sheriff duly advertised the same, and on the 12th day of July, A. D. 1881, sold said property to Henry J. Hawley, who received the sheriff's certificate therefor; that on the 21st day of April, A. D. 1882, the said Hawley received the sheriff's deed for the same; that on the 2d day of May, A. D. 1882, the said Hawley served a written demand on Phillip Laughlin for possession of the premises, and on the 7th day of June a like demand on Phillip and Joseph Little, who were then in possession as lessees of Laughlin; that the plaintiff is entitled to possession, and defendants wrongfully withhold the same, to his damage in the sum of \$150; that the value of the rents and profits since April 21, A. D. 1882, are \$150. Plaintiff demands judgment, first, for possession; second, for the rents and profits in the sum of \$150; third, for costs.

The answer denies all the material allegations of the complaint; denies that a written demand for possession was served on defendant Laughlin; admits service of

written demand on the other two defendants; and that at the time of said demand they were in possession of one hundred and sixty acres of land, situate in the North Fork of Elk Horn gulch, Gilpin county, under a lease from their co-defendant Laughlin, dated May 9, A. D. 1882; and being the same premises formerly occupied by him for the period of over six months prior to the date of said lease, and a part thereof being the same premises described in plaintiff's complaint. Defendant Laughlin, further answering for himself, alleges that on the 25th day of October, A. D. 1880, he purchased from one Alfred Rollins all his right, title and interest in a certain ranch claim situate in the North Fork of Elk Horn gulch, Gilpin county, Colorado, and paid him \$600 for the same, by the exchange of a house and lot belonging to him, and situate in Silver Plume, Clear Creek county, Colorado; that he went into possession of the same, and has ever since then been in actual possession thereof, until the lease given to his co-defendants as aforesaid; that this defendant was informed and believes the said Rollins bought the said ranch claim from one Samuel M. Keir. That at the time of his purchase he made diligent search of the records of Gilpin county, and of the courts of record of said county, and found no lien or incumbrance as described thereon; that it was a long time after he purchased said property before he learned that plaintiff claimed to have a lien upon the same under a transcript filed in the recorder's office, of said judgment rendered before said justice. Defendant says that said transcript was never recorded; that the same was simply indorsed, filed, and put in a safe kept and used by the county treasurer; that defendant had no knowledge of the existence thereof when he purchased said premises; that the same was no notice, nor any lien or incumbrance on said property when he purchased; praying judgment for costs, etc.

Exhibit A, setting forth lease of one hundred and

sixty acres by Laughlin to his co-defendants. Replication. Verdict and judgment for plaintiff. Appeal.

Mr. ALVIN MARSH, for appellants.

Messrs. FULLERTON and HULBERT, for appellee.

ELBERT, J. Section 212 of the code provides that "a transcript of any judgment rendered by any justice of the peace, duly certified by said justice, may be filed with the recorder of the county in which such judgment shall have been rendered; and from the time of filing such transcript, such judgment shall become a lien upon all the property of the judgment debtor, except personal property and property exempt from execution, in such county, in the same manner and to the same extent as if such judgment had been originally rendered in a court of record. Said lien shall continue for six years from the entry of judgment, unless the judgment be previously satisfied." The language of this section is plain, and gives the lien upon *filing* the transcript of the judgment with the recorder.

It is claimed that the clerk and recorder should have recorded and indexed the judgment, and that his failure to do so defeats the lien. The duty of the county clerk and recorder, in this respect, extends only to instruments "*authorized by law to be recorded in his office.*" Gen. St. §§ 58-60, pp. 266, 267. We find no law requiring or authorizing the transcript of a judgment from a justice of the peace to be recorded or indexed. If the clerk and recorder should keep any index or record of such judgments, it would be entirely voluntarily. It may be a great inconvenience, which the legislature should remedy, but, under the law as it stands, one seeking to know if real estate is incumbered by a lien under this section, must inquire for and examine the "files" in the office of the county clerk and recorder of the proper county. Did the law cast upon the clerk the duty of indexing and re-

ording such judgments, a question of greater difficulty would be presented, concerning which there is much conflict of authority. *Barney v. McCarty*, 15 Iowa, 510, and cases there cited.

When, on the 18th day of April, 1879, Lake and Hawley procured a transcript of their judgment before the justice, and filed the same in the office of the clerk and recorder in Gilpin county, they did all that was required of them under this section. Thereafter their judgment was a lien upon the real estate of Rollins, and took precedence over the subsequent transfer to the appellant Laughlin. The sheriff's deed to the appellee took effect, by relation, as though made on the day when the lien was created. Freem. Ex'ns, § 333. If the county clerk made false representations to the appellant respecting the judgment on file in his office, or refused him access to the "files" for the purpose of examination, it is a matter between him and the clerk, with which appellee has no concern.

The objection that the return of levy, certificate of sale, and the sheriff's deed were void for uncertainty in the description of the property was not well taken. Where the description of the property is in such general terms as to call for evidence *dehors* the writing, parol evidence is admissible to apply it to the subject-matter, and thereby render certain what would otherwise be doubtful and indefinite. "If, from such evidence, it appears that the terms used, as commonly understood in the neighborhood, clearly designate the property levied upon or sold, the description must be regarded as sufficient." Freem. Ex'ns, § 281; *Pipe v. Smith*, 4 Colo. 466. The description of the property in the complaint, return of levy, certificate of sale, and sheriff's deed is substantially the same. That there was no difficulty in identifying the property by persons familiar with it, from the description given, is evident from the defendant's answer and testimony. The defendant admits in his answer that

the *property described in the plaintiff's complaint* is a part of the one hundred and sixty acres leased by him to his co-defendants. He testifies: "I am one of the defendants. I *purchased the ranch described in plaintiff's complaint* from Alfred Rollins, in October, 1880. The deed was recorded in the recorder's office, October 26, 1880. I was in possession at that time. I exchanged a house and lot in Silver Plume for the ranch, that cost me \$600. I have owned it ever since,—claim to own it now. I have one hundred and sixty acres in all. I gave a lease to my co-defendants for a year from the 9th of May, 1882. They have been in possession under it since that time. There are three patented lodes on the ranch, and several unpatented. It was reported as mineral land not subject to pre-emption as agricultural land. Only a few acres can be tilled. * * * Rollins was in possession several years before I bought, and I and my lessees have been in possession ever since." This sufficiently removed all grounds for the objection made.

The instructions given by the court were substantially correct; nor is there anything in the other errors assigned requiring notice.

The judgment of the court below is affirmed.

Affirmed.

BASSINGER V. SPANGLER.

1. Under the statute of frauds of this state (Gen. St. § 1523), the sale of chattels must be followed by actual and continued change of possession.
2. The statute admits of no excuse for leaving personal chattels, capable of manual delivery and removal, in the apparent possession of the vendor; nor does it admit of a construction whereby there may be a joint or concurrent possession in both vendor and vendee; nor can a case be taken out of the statute, nor can the statute be satisfied, by proving that the sale was *bona fide*.
3. Unless the purchaser can show such a substantial compliance with the terms of the statute as affords visible notice to the community

9	175
12	487
12	489
12	490
9	175
14	223
14	809
9	175
15	253
9	175
17	65
17	557
9	175
2a	67
9	175
3a	154
3a	327
3a	491
9	175
4a	8
9	175
5a	418
5a	454
6a	100
7a	411
9	175
8a	24
9	175
24	107
9	175
12a	33

9	175
17a	211
18a	152

9	175
20a	203
20a	204

9	175
138	320
138	412

of a change in the ownership of the goods, the transaction constitutes a fraud in law, and, as such, must be held to be void as to creditors and subsequent purchasers in good faith of the vendor.

4. The recording of a bill of sale, the law not requiring or authorizing the recording of such instruments, is no notice to creditors of the vendor.
5. Where the uncontradicted evidence of the plaintiff fails to show such a compliance with the statute as would sustain a verdict in his favor, it is proper for the court to direct a verdict for the defendant.

Error to District Court of Arapahoe County.

JAMES F. WELBORN, prior to December 1, 1881, was the proprietor of the premises No. 323 California street, in the city of Denver, and with his wife occupied the same as his residence. He became indebted to the late E. P. Jacobson, and likewise to various other persons, and previous to December 1, 1881, conveyed these premises to Jacobson, but continued to reside thereon until April 1, 1882. Jacobson became surety for Welborn, March 16, 1880, upon the latter's note of that date, for the sum of \$4,000, payable to J. S. Brown & Bro., of Denver; and, after Jacobson's death, this note, being unpaid, was allowed as a claim against his estate, and ordered by the county court to be paid in due course of administration. The administrators, W. S. Decker and Annie W. Jacobson, paid this claim, amounting to the sum of \$4,430.60.

The present litigation, to a large extent, grew out of an attempt of said administrators to collect from Welborn the last-named claim, and the connection of plaintiff in error, Bassinger, therewith arose as follows: Bassinger, being the father of Mrs. Welborn, both he and wife became guests of the Welborn family about November 1, 1881, and thereafter continued to reside with the Welborns upon the premises aforesaid until April 1, 1882. During this time another debt of Welborn's, which he had secured by a chattel mortgage upon his household goods and furniture, matured, and the goods were adver-

tised to be sold on December 8, 1881, upon said mortgage. The day of the sale arrived, and quite a number of persons came to the house to attend the sale, but owing to the purchase of the property by Dr. Bassinger from Welborn prior to the hour advertised for such sale, and the payment of the chattel mortgage by Bassinger, the sale did not take place. The amount paid by the latter for the goods appears to have been the sum of \$6,000. The goods purchased consisted of carpets, furniture and other household effects. A bill of sale was executed by Welborn to Bassinger, and it was announced to the persons present that the property would not be exposed to sale upon the mortgage, for the reasons that it had been purchased by Dr. Bassinger and that the indebtedness had been paid by him. A formal or constructive delivery was made of the goods by Welborn to Bassinger, in the presence of several persons, and Bassinger afterwards, on the same day, caused the bill of sale to be recorded in the office of the clerk and recorder of Arapahoe county. After Bassinger's purchase he and his wife continued to reside with the Welborn family as before, there being no visible change of the family relations nor of the possession of the property purchased. Welborn's door-plate still remained on the door, but Bassinger did not indicate, by any outward sign, that the said house was his place of abode. He, however, testified upon the trial below, in which he was supported by the testimony of Welborn, that he had the absolute possession and control of the goods purchased by him, from and after the time of the transfer thereof to him as aforesaid. Subsequent to the purchase of the goods by Bassinger, Decker spoke to him about payment of rent for the premises, but he declined to pay rent, referring Decker to Welborn. Decker also advised with him at different times about the sale of the household furniture, stating, in substance, that he was desirous of disposing of the premises upon which Welborn and Bassinger were residing, and that it

would be for the interests of both parties to sell the premises and the furniture and goods to the same purchaser, he having one in view, and asking Bassinger to put a price upon the goods. It appears that afterwards Bassinger was negotiating with one Sands with respect to the sale of the goods, and that Sands was at the same time negotiating with Decker for the purchase of the real estate; but before these negotiations were consummated the administrators of the Jacobson estate attached the goods and household furniture as the property of Welborn, in satisfaction of the judgment entered in the county court against the Jacobson estate. Bassinger replevied the goods as belonging to him, and upon the trial of the replevin suit, at the conclusion of the testimony, the court instructed the jury to return a verdict for the defendant, which was done and judgment entered thereon; to reverse which judgment this writ of error is prosecuted.

Mr. CHAS. H. TOLL, for plaintiff in error.

Messrs. DECKER and YONLEY, for defendant in error.

BECK, C. J. The question presented by this record for our decision is whether the transaction between James F. Welborn and Dr. Bassinger comes within the fourteenth section of the statute of frauds, and constitutes thereby a *fraud in law*. This section reads as follows:

“Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void as against the creditors of the person making such assignment or subsequent purchasers in good faith, and this presumption shall be conclusive.” Gen. St. § 1523.

In this case, as in many of like character, the good

faith of the purchaser is not questioned, but the attaching creditors, who are represented by the defendant in error, rely upon the requirements of the statute that the sale must be followed by an *actual and continued change of possession*, and the failure of the purchaser to comply therewith.

The principal error assigned is the withdrawal from the jury of the questions of fact whether or not the evidence showed a sufficient delivery of the property sold, and whether the same was followed by an actual and continued change of possession. Had there been conflicting testimony on these points, and if the testimony on the part of the plaintiff had been sufficient in law to have sustained an affirmative verdict, the action of the court would have constituted error. But the evidence upon these points was almost, if not quite, that given by the witnesses of the plaintiff, Bassinger, and was not conflicting. It is only necessary for us, therefore, to consider its legal effect. The statute is plain, positive, and peremptory. It admits of no excuse for leaving personal chattels, capable of manual delivery and removal, in the apparent possession of the vendor; nor does it admit of a construction whereby there may be a joint or concurrent possession in both vendor and vendee; nor can a case be taken out of the statute, nor can the statute be satisfied, by proving that the sale was *bona fide* and no fraud intended. Unless the purchaser can show such a substantial compliance with its terms as affords visible notice to the community of a change in the ownership of the goods, the transaction constitutes a fraud in law, and as such must be held to be void as to creditors and subsequent purchasers in good faith of the vendor.

Cook v. Mann, 6 Colo. 21, is cited by both parties in the controversy as a very proper construction of this statute, both finding therein principles of law announced which they construe as supporting their respective theories as to the proper disposition of the points involved in the

present controversy. They also find, as they suppose, analogous facts and circumstances, in respect to which they insist that the same rules of construction must be applied. The circumstances of that case respecting the change of possession, when carefully examined, will be found to differ widely from those appearing in the case at bar. That was the sale of a stock of goods consisting of boots and shoes. The stock was in the store-room in which Haywood, the owner, was and had been pursuing his business as a merchant. The goods sold were not removed from this store-room at the time of the sale. Haywood did not quit the store-room upon the completion of the sale, but the provisions of the statute were satisfied nevertheless. An inventory of the goods was taken, and the price (\$4,000) was paid. The purchaser, Mann, took immediate possession, not only of the goods, but of the store-room in which they were situated. He assumed the lease, hired his clerks (one of them being Haywood, the former proprietor), and changed the sign by placing his own sign, "C. Y. Mann & Co.," over the door. He then devoted his time and attention to the business, personally managing the same, at the same stand, replenishing the stock when necessary, and assuming exclusive control of the business. Chief Justice Elbert, who delivered the opinion, says: "All the *indicia* of ownership usual in mercantile business were present, and there was a complete change of the control and dominion of the property." Now, it is obvious, from this statement of the case referred to, that so far as the immediate delivery of possession was concerned, and likewise with respect to the actual and continued change of possession, there was nothing colorable or uncertain. The possession was neither joint nor concurrent in the vendor and vendee, but visibly absolute in the vendee. No one could approach the store without witnessing the evidence of a change of ownership. The employment of the former proprietor in the capacity of a clerk was held to be un-

objectionable, since a clerk is not vested with the possession of the merchant's goods. If the transaction was tainted with fraud at all, it was fraud in fact, and not fraud in law. But no fraud in fact was charged. The rules of law laid down as a proper construction of the statute were:

"The vendee must take the actual possession, and the possession must be open, notorious and unequivocal; such as to apprise the community, or those who are accustomed to deal with the party, that the goods have changed hands, and that the title has passed out of the seller and into the purchaser. This must be determined by the vendee using the usual marks or *indicia* of ownership, and occupying that relation to the thing sold which owners of property generally sustain to their own property. The possession must be exclusive of the vendor. A concurrent or joint possession is not admissible."

The rules here announced are believed to be the established rules of construction of the statute quoted, and apply to all cases, so far as the facts necessary to be done *subsequent* to the purchase are concerned. These acts must be of such a character as to afford reasonable notice to the public of the change of ownership. The same acts are not required in each case that arises, but equivalent acts must be performed in order to render the sale valid. In the case cited no essential precaution seems to have been omitted.

Now, what acts did Dr. Bassinger perform, subsequent to his purchase, which afforded notice to the community that he, and not Welborn, owned these household goods. At the time of the sale Welborn was the party in possession of the house, and Dr. Bassinger and his wife were the guests of Welborn and his wife. Both families continued to reside in the house after as before the sale. How, then, did the plaintiff acquire the *actual, exclusive* and *visible* possession which is essen-

tial to the validity of the transaction? We have just seen how the same statute was satisfied in the purchase of a stock of goods, but we look in vain for equivalent acts performed by Dr. Bassinger in the present case. He made or kept up the fires in the furnace; he did this before as well as after the sale. He paid some of the household expenses; but to whom is not stated. He talked of his purchase with some of his neighbors; this is of no force,—the statute does not permit the transaction to rest on the declarations of the parties, nor upon acts of such character as to be insufficient to give the requisite notice to creditors. He recorded the bill of sale given him by Welborn; the law does not require or authorize such instruments to be recorded,—hence the record is no notice to creditors. Both he and Welborn say he assumed possession and control of the furniture from the time of the purchase until the levy of the attachment; but when asked what was done to manifest this to the outside world, only the above-mentioned matters, and the publicity of the sale on December 8th, could be stated. It is not sufficient that a sale is open and *bona fide*. These facts need not be disputed by a creditor. It is easier to state what Mr. Bassinger failed to do. He did not visibly or openly assume the proprietorship of the residence in which the carpets, chairs and other goods were situated. He did not accept a lease of the house, but refused to pay the rent. He did not indicate, even, by a sign upon the door, that the house No. 323 California street was the place of his residence. On the contrary, a caller would be informed by the door-plate that it was the residence of James F. Welborn. Inside, no change of the relations of the two families,—Dr. Bassinger and wife, and Mr. Welborn and wife,—or in the occupation of the house, or use of the furniture, was apparent.

Counsel for plaintiff in error relies, mainly, upon the good faith of the transaction, and cites us to respectable

and able decisions in favor of his theory of this case; but the fact that these decisions were based upon statutes dissimilar to ours — statutes not containing the peremptory requirements of section 14 of our statute of frauds — renders them inapplicable as authority in this case. His principal reliance is upon the decisions of the supreme court of the state of Pennsylvania. The statute of Pennsylvania, upon which the decisions cited were based, does not appear to have contained the provisions of section 14,— that “unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith, *and this presumption shall be conclusive.*” By reason of the absence of such statutory provisions, the courts of Pennsylvania are able to recognize, in certain cases, a constructive delivery of personal chattels, followed by a constructive or concurrent possession, and to make the validity of a sale depend upon the *bona fides* of the transaction. This distinction between the statutory rules of the two states is a very important one. The validity of the same transaction, if tested under one statute, may be decided upon the weight of testimony as to whether or not there existed therein *fraud in fact*. We do not mean to say that all cases arising under the statute might be so determined; but the other statute requires the submission of the further issue, in all cases, whether certain acts have been performed the omission of which *constitutes fraud in law*, and conclusively avoids the sale. We can, therefore, only recognize as authority in the construction of the foregoing section of our statute decisions based upon the same or similar statutory provisions. As said by Chief Justice Currey in *Woods v. Bugbey*, 29 Cal. 479:

“It is quite useless to cite decisions made under the

statutes of Elizabeth, and of New York or other states, allowing the want of an immediate delivery, and an actual and continued change of possession, to be explained or accounted for, as authoritative expositions of the rule which our statute has provided."

The decisions cited in the briefs, upon statutes substantially the same as our own, are those of California, Nevada, Montana, Vermont and Connecticut. The statute of Missouri is *similar*, as is also the rule of decision established by the courts of that state. The statutory provisions of the following states appear to be essentially different from section 14 of our statute of frauds: Pennsylvania, New York, Michigan, Maine, Massachusetts and New Hampshire.

This classification of authorities discloses that the cases tending to sustain the plaintiff's theory arose upon statutes unlike the statute under consideration. For example, in *Evans v. Scott*, 89 Pa. St. 136, the same house was occupied jointly by two brothers, one being married and the other a bachelor. The lease of the building was in the name of the married one, but both contributed to the payment of the rent. The carpets upon the floor had been purchased and laid down by the married brother; but, being unable to pay for them when the note given therefor matured, he sold them to his brother, who paid the note, and by order of the vendor received from the merchant a bill of sale of the carpets; after which they were suffered to remain in the same situation as they were previous to the sale, and to be used by both brothers as before. Held, there was a sufficient change of possession; that an actual change of possession could not be made without one brother turning the other out of doors, which was unnecessary. The court held that "the question, under such circumstances, to be submitted to the jury, is whether the change of possession was actual and *bona fide*,—not pretended, deceptive, and collusive; and whether such change of possession was all

that could have been expected of the vendor [vendee], taking into view the character and situation of the property, and the relations of the parties." This would indicate a flexible statute, which may be construed to suit the circumstances of the parties.

The rule laid down in *Hall v. Parsons*, 17 Vt. 271, was that a concurrent possession of personal property by the vendor and vendee, after the sale, renders the sale fraudulent *per se* as to the creditors of the vendor; but to have that effect the joint possession must appear to be of the same description, in the use, occupancy, and disposition of the property, as that of joint owners.

In *Norton v. Doolittle*, 32 Conn. 405, the court say: "The rule of law which requires a change of possession is one of policy. Its object is the prevention of fraud. It applies both to property attached and to property sold. The policy which dictates, and the prevention at which it aims, requires its rigid application to every case where there has not been an actual, visible, and continued change of possession."

The supreme court of California construed a section of the statute of frauds of that state, corresponding to our section 14, in *Stevens v. Irwin*, 15 Cal. 503, the decision being subsequently approved as the true rule of construction in *Godchaux v. Mulford*, 26 Cal. 316. The rule laid down in those cases was:

"Delivery must be made of the property. The vendee must take the actual possession. That possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous,—not taken to be surrendered back again; not formal, but substantial."

In *Brown v. Kimmel*, 67 Mo. 430, the sale of a stock of

goods in a store was held void because no *indicia* of a change of ownership were visible. The sign of the former proprietor, who made the sale, was permitted to remain on the building, and the vendor was frequently at the store after the sale, and occasionally made sales of goods himself. The court held that the retention of the old sign amounted to a declaration to the public that Dogherty was still proprietor of the store, and that it gave to the transaction an equivocal character. It was further held that the change of possession, not having been such as the statute required, as appeared from the undisputed facts of the case, should have been declared to be fraudulent as a matter at law. See, also, *Woods v. Bugbey*, 29 Cal. 466; *Lawrence v. Burnham*, 4 Nev. 361; *Hull v. Sigsworth*, 48 Conn. 258; *Claflin v. Rosenberg*, 42 Mo. 449; *Perrin v. Reed*, 35 Vt. 2; *Pierce v. Chipman*, 8 Vt. 337.

The point is made, and strongly insisted upon, by counsel for the plaintiff in error, that a compliance with the terms of the spirit and letter of the statute, in the present case, was waived by the knowledge and conduct of the creditors. They knew of the sale to the plaintiff, and practically conceded that his purchase was made in good faith. These circumstances in no manner relieved the plaintiff from a compliance with the terms of the statute. The statute being peremptory, the purchaser's failure to comply therewith placed the creditors of his vendor in the condition mentioned in the case of *Perrin v. Reed*, *supra*, where it was held that "a creditor, with full knowledge of such a transaction, has notice of a sale that in law is void as to him;" or, as held in *Lawrence v. Burnham*, *supra*: "Whether the creditor has knowledge of such a sale or not is of no consequence."

It is argued that adherence to the strict letter of the statute works a manifest hardship in the present case; that the statute should have a reasonable interpretation, according to the nature of the property conveyed and

the circumstances of the parties. Authorities to such effect are cited. That the rule operates with hardship in many cases affords to the courts no excuse for declining to enforce it. Cases decided under statutes containing the provisions of our section 14 are often preceded by the statement that the "good faith" of the transaction is not questioned; but, notwithstanding such concession, the transaction is never sustained, when resting on this proposition alone. In so far as the specific requirements of the statute are concerned, as elsewhere stated, they admit of no excuse. All courts administering this statute, so far as we are advised, hold that proof of good faith and the payment of value will not supply the place of the acts required to be performed. The cases of *Hull v. Sigsworth*, *Woods v. Bugbey* and *Lawrence v. Burnham*, *supra*, were all cases of hardship, and others of this character might be cited.

[Our statute has not always been in its present peremptory form. Section 14, however, is literally identical with section 14 of the original act of October 31, 1861 (Laws 1861, p. 244), down to the closing words of the present section — "*and this presumption shall be conclusive.*" This clause in the original act was in the following form: "And shall be conclusive evidence of fraud." But the legal effect of the original section was so qualified by an additional provision as to practically alter the remedy and change the legal effect of the section. This provision was: "*Unless it shall be made to appear on the part of the person claiming under said sale or assignment that the same was made in good faith and without any intent to defraud such creditors or purchasers.*" If the latter provision still existed, the plaintiff's arguments, authorities and evidence would be in point; for it is plain that in such case the validity of plaintiff's purchase might have been determined in his favor upon proof that the same was made in good faith and without any intent to defraud creditors or purchasers. The elimination of this

qualifying provision is a strong indication that it rendered the original section inefficient to prevent fraudulent transfers of personal property.] Its effect, while in force, was to authorize a recovery by the vendee in every case upon the finding of a jury that his purchase was made in good faith and without any intent to defraud creditors or subsequent purchasers. The experience of the bar, as well as the experience of the courts, is that proof of this character can be as readily produced in cases of fraudulent sales and purchases as in those in which no element of fraud exists. But by striking out this provision and resting the issue in every case upon the question of *fraud in law*, instead of *fraud in fact*, though attended with hardships in some cases, the statute was rendered effective. No pretext or excuse for non-compliance with the spirit of its provisions could then be entertained, for thereupon they became positive and peremptory, and failure to comply therewith raised a *conclusive* presumption that the sale was fraudulent and void as to creditors and to subsequent purchasers in good faith. The fifth section of the New York act of December, 1827, concerning fraudulent conveyances, etc., was almost identical with section 14 of our statute of 1861. It appears to have been passed to establish a stable rule for the prevention of frauds upon creditors, instead of the statutes of 13 and 27 Elizabeth, which had become so incumbered with exceptions by the decisions of English and American courts as to be practically of no force.

An interesting and concise statement of the effect of the above-mentioned statutes, and the adjudications thereon, is given by Chief Justice Currey in *Woods v. Bugbey*, *supra*. Respecting the fifth section of the New York act of December, 1827, he says: "It failed to prevent the frauds against which the statutes of 13 and 27 Elizabeth were aimed, as the judicial history of that state since the act went into effect abundantly attests." We are of opinion that "the judicial history" of both

this country and England demonstrates the wisdom of a positive rule, such as that in force in this state and the other states previously referred to, under which no latitude is given the courts to change the issue from fraud in law to fraud in fact. As held in *Norton v. Doolittle*, *supra*, the rule is one of *policy*, and to make it effective as a remedy it must be rigidly applied in every case where there has not been an *actual, visible and continued change of possession*.

The argument that a reasonable interpretation must be placed upon the statute, and that impossibilities should not be required, is recognized by us as sound. At the same time a purchaser cannot be permitted, in any case, to fold his arms after making his purchase, take no steps to complete the sale, and have his case excepted from the rule by reason of his good faith and the inconvenience attending a substantial compliance with the statute. It is true, as suggested by counsel for plaintiff in error, that the statute does not require impossibilities. A purchaser of two thousand sacks of grain cannot reasonably remove them all immediately. The purchaser of a kiln of hot brick cannot remove the brick while hot. But other acts can be substituted which will apprise the community of the change of ownership and satisfy the demands of the law. This subject was considered in *Lay v. Neville*, 25 Cal. 545, wherein the court say:

"It was not intended by the fifteenth section of the statute of frauds to make a sale void, as against the creditors and purchasers of the vendor, unless the vendee should perform in every case what might in some cases be an impossibility. * * * The acts that will constitute a delivery will vary with the different classes of cases, and will depend very much upon the character and quantity of the property sold as well as the circumstances of each particular case."

The court makes a distinction between ponderous

articles, as a block of granite or a stack of hay, and articles of small bulk, as a parcel of bullion or a sack of grain. After consideration of the various circumstances, the rule stated by the court as applicable to all cases is:

“It was intended that the vendee should immediately take, and continuously hold, the possession of the goods purchased in the manner, and accompanied with such plain and unmistakable acts of possession, control and ownership, as a prudent *bona fide* purchaser would do in the exercise of his rights over the property, so that all persons might have notice that he owned and had possession of the property.”

Upon a full consideration of the law applicable to the present case, and of the facts as shown by the plaintiff's witnesses, we are of opinion that no error was committed in withdrawing the case from the consideration of the jury. The rule is that where the uncontradicted evidence of the plaintiff fails to show such a compliance with the statute as would sustain a verdict in his favor, it is proper to direct a verdict for the defendant. *Stern v. Henley*, 68 Mo. 262; *Brown v. Kimmel*, *supra*. The case of *Parks v. Barney*, 55 Cal. 240, is not in point, since the evidence there strongly tended to show a compliance with the provisions of the statute.

In respect to the attempted negotiations of Mr. Decker, we fail to see how they excuse the non-performance of acts required to be done by the plaintiff.

The judgment must be affirmed.

Affirmed.

McCLAIN V. THE PEOPLE.

1. That portion of section 242 of the code, which provides for preliminary possession and use of property pending condemnation proceedings, is not open to objection under section 15, article II, of the constitution.

9	190
11	265

9	190
2a	247

9	190
2a	543

9	190
36	425

2. The right of temporary possession is not as of course. It is the duty of the judge before granting the order to investigate and determine, first, whether the preliminary possession is needful, and secondly, what sum will be a sufficient deposit to cover the award when made.

Error to County Court of Clear Creek County.

PROCEEDINGS were instituted in the court below in pursuance of the eminent domain act, for the purpose of condemning a right of way over premises under the control of plaintiff in error. In accordance with the statute, an order was obtained from the court for occupancy and use pending the condemnation proceedings. Petitioner complied with this order by depositing with the clerk of the court the sum fixed by the judge thereof; but its attempt to take possession under the order was resisted by plaintiff in error, who was respondent. Thereupon plaintiff in error was cited before the court to answer for a contempt. Upon investigation he was found guilty, and judgment duly pronounced. To review and reverse that judgment this writ of error was sued out.

The statute above referred to is section 242 of the Civil Code. It reads, *inter alia*, as follows: “* * * And at any stage of * * * any proceedings under this act the court or judge may, by rule in that behalf made, authorize the said petitioner * * * to take possession of and use said premises during the pendency, and until the final conclusion, of such proceedings, and may stay all actions and proceedings against such petitioner on account thereof; provided, such petitioner shall pay a sufficient sum into court, or to the clerk thereof, to pay the compensation in that behalf when ascertained; provided, further, that the judge of the court before or wherein any such proceedings are had shall determine the amount such petitioner shall be required to pay or deposit pending such ascertainment. * * *”

Section 15, article 2, of the state constitution, which is referred to in the opinion, contains the following lan-

guage: "That private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested. * * *"

Mr. W. T. HUGHES, for plaintiff in error.

Mr. WILLARD TELLER and the ATTORNEY-GENERAL, for the State.

HELM, J. The principal objection urged in this case challenges the constitutionality of section 242 of the Civil Code, in so far as it permits the preliminary possession and use of property pending condemnation proceedings. This challenge is based upon a supposed disregard of section 15, article 2, of the state constitution. A partial analysis of the constitutional provision named discloses the following facts: That it first prohibits the taking or damaging of private property for public or private use without just compensation; that it then requires such compensation to be ascertained in one of two ways, viz., by a board of commissioners of not less than three freeholders, or by a jury, when demanded by the owner of the property; and that it follows this requirement with a restrictive clause, declaring, in effect, that until such compensation, ascertained in one of these methods, shall have been paid to the owner, or into court for the owner, the property shall not be *needlessly* disturbed, or the proprietary rights of the owner divested.

It is therefore to be observed that under the constitution but two methods of ascertaining the final compensation to be paid in such cases are recognized. It is also

to be noted that until the compensation, ascertained in one of the two ways mentioned, shall have been *first paid or deposited*, the title or proprietary rights of the owner cannot be divested, nor can the property be needlessly disturbed. But the insertion of the provision relating to *needless* disturbances of property is a recognition of the fact that there may be *needful* disturbances thereof; also that such needful disturbances may take place without the prior payment or deposit of compensation ascertained in one of the two methods designated. In this respect our constitution seems to be unique; no exactly corresponding provision is to be found in the constitutions of other states. That of Missouri contains the nearest approach thereto that we have discovered. Section 21, article 2, thereof embraces a similar expression, except that the word "needlessly" is omitted. The present constitution of Missouri was adopted in 1875, that of Colorado in 1876, and it is altogether probable that the language of our section 15 aforesaid, now under consideration, was borrowed from the Missouri provision mentioned. If this be true, the interpolation of the word "needlessly" is of peculiar significance. Aside from the rule requiring that every word in a law, whether constitutional or statutory, shall, if possible, be given some meaning, there is therefore, in this case, an additional reason for concluding that the change in question was deliberately and intentionally made by the framers of our constitution for a specific purpose.

We do not feel warranted in holding that this word was inserted for the purpose only of permitting, without prior compensation, certain temporary disturbances,—such as those occasioned by running surveys, locating lines, and the like. The legislative power to authorize a temporary occupancy for these purposes, without requiring a prior ascertainment and deposit of damages, has been generally recognized under stringent constitutional provisions for the protection of land-owners, that

contain nothing on the subject of needless or needful disturbances. *Cushman v. Smith*, 34 Me. 247; *Cooley*, Const. Lim. 694; *Mills*, Em. Dom. § 36.

The use of the word "needlessly," in our judgment, indicates that the constitution makers contemplated that other disturbances than the foregoing might be needful. But as to what these other needful disturbances are, that instrument is silent; therefore the duty of naming them must have been left with the legislature. All that body could do, however, was to recognize, in some general way, a class or classes of disturbances which might be needful in particular cases. This they have done in the statute before us. They have substantially said that, in some instances, the occupancy and use of premises by petitioner, pending condemnation proceedings, may be needful disturbances, within the meaning of the constitution. The exclusive possession and enjoyment of property are undoubtedly "proprietary rights;" but by this statute these rights are not "divested,"—they are merely suspended. Every disturbance of property almost of necessity involves the interference with some proprietary right,—in many cases the temporary suspension thereof.

The use, however, of the word "needlessly" in this connection implies an investigation of some sort. A disturbance which in one case might be deemed needful, in another might, with equal propriety, be adjudged needless. But it is clearly impossible for the legislature to sit in judgment upon each particular case, and ascertain whether or not the various disturbances sought are needful. Therefore, while that body has determined that a preliminary possession and use may be a needful disturbance, it has very appropriately delegated to certain courts, and the judges thereof, the duty of passing upon this question in particular cases as they arise. We are of opinion that the statutory expression, "the court or judge *may*, by rule, * * * authorize the said peti-

tioner to take possession," etc., confers upon him a discretionary power; that the word "may" does not mean "shall."

But the legislators concluded that while a prior final investigation and award of damages by commissioners or by a jury is not essential, yet a careful regard for the interests of land-owners, and possibly also for the spirit of the constitutional provision before us, rendered security of some kind an important prerequisite to such disturbances as those now under consideration. Hence they enacted a wise limitation upon the powers of the court or judge in the premises. They provided that whenever the court or judge, upon investigation, determines that occupancy and use pending the proceedings is a needful disturbance, he shall likewise, upon investigation, ascertain what amount will probably be sufficient to pay the sum that may ultimately be awarded by the commissioners or jury; and they further ordained that only upon the prior deposit of such sum by petitioner with the clerk of the court can such adjudged needful disturbance take place. This court, after mature consideration, has held, under the statute before us, that such deposit is security, not only for the payment of the compensation ultimately awarded if the property be taken, but also for the damages suffered by the land-owner in case the proceedings are abandoned. *Denver & N. O. R'y v. Lamborn*, 8 Colo. 380.

It follows from the foregoing conclusions that, in our opinion, the constitutional objection presented is not well taken. The judgment is accordingly affirmed.

Affirmed.

9	196
9	544
9	196
8a	86
9	196
15a	50
9	196
h18a	270

WHEELER V. KUHN'S.

In cases of appeal from the county to the district court, under section 500 of the General Statutes, it is the duty of the district court, when properly requested, to permit defective appeal bonds, which have been approved by the county judge, to be amended, or to permit the filing of new bonds, and a refusal so to do is error subject to review by this court.

Appeal from District Court of Pitkin County.

THIS cause was originally brought in the county court. Judgment being there rendered in favor of the plaintiff, defendant prayed an appeal to the district court. The appeal was allowed under section 499 of the General Statutes. This section reads, *inter alia*, as follows: "Provided, * * * the party desiring such appeal shall * * * give good and sufficient bond, with one or more sureties to be approved," etc. The principal, Wheeler, did not execute the bond, nor did any one sign her name thereto as agent or attorney in fact; otherwise the bond filled all statutory requirements. It was accepted and approved by the county judge. Before the case was called for trial in the district court, appellee presented his motion to dismiss, on the ground that neither the statute, nor the order of court providing for an appeal bond, had been complied with. Appellant asked leave to file a new and sufficient bond, but her request was denied, and the motion to dismiss was sustained. From such judgment of dismissal the present appeal was taken.

Mr. H. D. WAITE, for appellant.

Messrs. J. M. DOWNING and D. J. HAYNES, for appellee.

HELM, J. The judgment of the court below must be reversed. The statute regulating appeals from the county to the district court undoubtedly requires that appellant

shall be a party to the appeal bond, and execute the same as principal. The bond challenged in this case was therefore wholly insufficient. But it appears that appellant attempted, in good faith, to give a sufficient bond, and thus to perfect her appeal. The instrument was approved and filed by the proper officer without objection, and within the time fixed by law. It was afterwards transmitted, with the other files in the case, to the district court. The conduct of the county judge in the premises accorded with appellant's belief that she had complied with the statute, and order of court thereunder, in this regard. That court had complete jurisdiction of the subject-matter in controversy, and of the parties to the action. The district court also was clothed with full jurisdiction over the subject-matter. The proceedings and trial in the latter court on the appeal would have been wholly *de novo*. In view of these circumstances it was clearly the duty of the district court, under the following legislative provision, to have permitted the filing of the new and sufficient bond tendered by appellant, and to have retained and tried the cause.

Section 500 of the General Statutes, treating of appeals from the county to the district court, closes with the following: "And provided further, that no appeal shall be dismissed on account of a defect or informality in the appeal bond, or the insufficiency thereof, if the appellant or appellants shall within a reasonable time, to be fixed by the court, file a good and sufficient bond." This provision is imperative. In effect, it commands the district court, when properly requested, to fix a time for filing an amended bond; also to approve the same, if sufficient and if tendered within the period named. The court has no discretion thereunder, save as to the length of time it may allow for curing the insufficiency or defect, and even then such time must in all cases be reasonable. A refusal to make such order is error which may be reviewed by this court.

These deductions are, we think, fairly drawn from the legislative language considered. They are certainly equitable. The object in requiring an appeal bond, when the appeal operates as a *supersedeas*, is to provide security for the payment of the judgment and costs, in case a retrial or review before the appellate court shall result in a similar verdict, or in affirmance, as the case may be. The district court, in cases like the one at bar, as we have seen, is empowered when such bond is defective, if asked in apt time, to grant appellant's motion for leave to file a new and sufficient one. Under this authority, the purpose of the law is accomplished when a good and sufficient bond is approved and filed; nor is it important whether the insufficiency of the original instrument consists in some merely formal omission, or whether the defect complained of be a failure to comply with the most material requirement of the statute. The approval by the court which tried the cause of the imperfect obligation, given in good faith, and the transmission thereof to the appellate tribunal, entitles appellant to the benefit of the corrective statute. Appellee has the undoubted right to demand a bond which is satisfactory in all respects, and if, after such demand is made, the order of court in pursuance thereof be not complied with, he is entitled to have the appeal dismissed; but if appellant files, within the reasonable time fixed by the court, a sufficient bond, appellee no longer has just cause of complaint.

In the absence of judicial authority on this question, we would feel impelled to adopt the foregoing conclusions. But we are amply sustained. In Illinois, under a statute providing for the amendment of appeal bonds in cases taken by appeal from justices of the peace to the probate court, which is almost exactly similar to the statutory extract above given, it was held that, no matter how defective the instrument purporting to be a bond might be, it was amendable; also that the allowance of the amendment by the probate court was an imperative

duty; and that the denial of appellant's motion for leave to amend was error, requiring a reversal of the judgment dismissing the appeal. *Dedman v. Barber*, 1 Scam. 254; *Waldo v. Averett*, id. 487; *Hubbard v. Freer*, id. 467; *Trustees v. Starbird*, 13 Ill. 49; *Bragg v. Fessenden*, 11 Ill. 544.

In 1853 the Illinois provision aforesaid was slightly altered. After such alteration it read as follows: "No appeal from a justice of the peace shall be dismissed for any informality in the appeal bond; but it shall be the duty of the court before whom the appeal may be pending to allow the party to amend the same within a reasonable time, so that a trial may be had upon the merits of the case." It will be observed that the language of this statute is hardly as strong as that in the Colorado provision under consideration. There the appeal is not to be dismissed for any *informality* in the bond, while with us it is not to be dismissed on account of any *defect, informality, or insufficiency* therein; yet the Illinois decisions under their amended statute are precisely the same as before. *Wood v. Tucker*, 66 Ill. 276; *Patty v. Winchester*, 20 Ill. 261; *Weist v. People*, 39 Ill. 509; *Hinman v. Kitterman*, 40 Ill. 253; *Town of Partridge v. Snyder*, 78 Ill. 519.

In the case of *Crain v. Bailey*, 1 Scam. 321, the judgment dismissing an appeal from the probate to the circuit court, on account of defects in the bond, was sustained, but the decision is expressly put on the ground that the statute in that state regulating *such* appeals "makes no provision to amend the bond, or file a new bond, in case an insufficient one is filed."

The judgment is reversed.

Reversed.

WATSON ET AL. V. LEMEN.

9	200
10	508
11	542
9	200
15	132
9	200
17	581

1. In an action on a promissory note under the statute (section 66, Code), a failure to verify the answer, the complaint being unverified, does not prevent a trial of all material questions properly presented, save the genuineness and due execution of the note.
2. A traverse of the allegation in a complaint that the indebtedness is due, without denying the facts averred which show such maturity, is bad.
3. Under our present practice there is no general denial nor general issue. Each material allegation must be specifically traversed; nor is there any formal plea in abatement. Matters in abatement, unless appearing on the face of the complaint, must be set up by answer.

Appeal from District Court of Arapahoe County.

THIS action was originally begun in the county court by appellee, against appellants, to recover the principal and interest claimed to be due upon two promissory notes executed by the latter in favor of the former. These notes were set out *in hæc verba* in the complaint, and the complaint further averred that they were due and unpaid. Defendants answered, denying the genuineness and due execution of the notes, and also denying that *the notes were due*. A trial before the county court resulted in judgment for plaintiff, whereupon defendants appealed to the district court. In the latter court, on motion of plaintiff, judgment was rendered in his favor upon the pleadings, defendants being denied the right to controvert by proof any averment of the complaint. Plaintiff relied, in support of his motion to dismiss, upon the closing portion of section 66, Code Civil Procedure, which reads as follows: "When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified." Neither the complaint nor the answer

was verified. From the judgment in the district court the present appeal was taken.

Messrs. HARMON and COVER, for appellants.

Mr. ENOS MILES, for appellee.

HELM, J. Under the statute, in order to present issues upon the genuineness and due execution of the instruments copied into the complaint, the answer should have been verified. Therefore, in so far as these issues are concerned, the ruling of the district court was unquestionably right. But the answer also denies that the notes were due, and the only question presented to us for consideration is the effect of this denial. The failure to verify the answer, the complaint being unverified, only estopped defendants from attacking the genuineness and due execution of the notes in controversy. The statute did not operate to prevent them from trying other material questions that may have been presented by proper allegation and denial in the pleadings. It was consistent with the admission that the notes were genuine and duly executed to aver and prove that the dates of maturity appearing therein had been changed. Did the pleadings in the case at bar properly present such a question for trial?

No cause of action exists unless the indebtedness sued for is due. It is therefore necessary, in actions like the one at bar, that the complaint should sufficiently cover this subject. But while this is true, it is also true, especially under code procedure, that the maturity of the indebtedness, like everything else material to a recovery, should be shown by *facts stated*. It is not enough for plaintiff to simply aver that the indebtedness *is due*. Such averment is the statement of no fact. It is, on the contrary, the declaration of a mere legal conclusion, drawn from facts that should themselves be pleaded.

Frisch v. Caler, 21 Cal. 71; *McKyrng v. Bull*, 16 N. Y. 297; Bliss, Code Pl. § 213.

But it is a well-known general rule of pleading that the statement and denial of pure conclusions of law, *i. e.*, those unmixed with conclusions of fact, present no issue for trial. To traverse the allegation that the indebtedness is due, without denying the facts averred which show such maturity, is vicious pleading. It leaves the question of maturity wholly admitted. A good illustration of this fault is furnished by the case at bar. Defendants, as we have seen, by failing to verify their answer, admitted the genuineness and due execution of the notes as pleaded. This admission covered the whole tenor and effect of the instruments. *Burnett v. Stearns*, 33 Cal. 468. But according to the tenor thereof, the indebtedness represented thereby was due. Defendant, therefore, simply denied a legal conclusion, while admitting the facts upon which it was based. If, through collateral, contemporaneous or subsequent valid agreements, the time of payment stated in the notes was extended, it is evident that the agreements for such extension were new matter and should have been specifically pleaded in the answer.

That the right of action had not accrued when the suit was commenced is ground for plea in abatement at common law; but, according to Prof. Pomeroy, "all defenses which are analogous to the ancient pleas in abatement,—that is, all which are based upon the same facts,—are evidently new matter. They cannot be proved under the general denial, but must be specifically pleaded." Pom. Rem. §§ 697, 711; *Hargan v. Burch*, 8 Iowa, 309. It is true that at common law this question was frequently tried under the general issue (Gould, Pl. § 138; *Monro v. King*, 3 Colo. 238; *Heaton v. Myers*, 4 Colo. 59); though such proceeding in actions of *assumpsit* was highly illogical and was finally repudiated in England. See *McKyrng v. Bull*, *supra*. At present, however, there is no such thing known to our system of pleading

as the "general issue." Neither have we any "general denial," as have New York, California, and some of the other code states. Under our procedure each material allegation must be specifically traversed. Civil Code, § 61; *Alden v. Carpenter*, 7 Colo. 87. And all matters in abatement, unless appearing on the face of the complaint, are with us pleaded by answer in precisely the same manner as are matters in bar.

With reference to the case of *Davanay v. Eggenhoff*, 43 Cal. 395, relied upon by appellants, we have this to say: *First*. A careful reading of the opinion shows that decision to have rested upon the question of *payment*. The complaint averred that the note remained due and unpaid. Defendant pleaded a general denial. This the court held sufficient to make an issue on the matter of *payment*. The subject of maturity, which is wholly distinct from that of payment, was not considered. *Second*. In California, where actions are brought upon promissory notes, it is held necessary for plaintiff to expressly aver the fact of non-payment. The rule is different in all other code states wherein the question has been considered; though in them, if plaintiff does make the averment, a denial thereof, general or special, as their respective statutes provide, authorizes defendant to introduce proof of payment. Pom. Rem. § 710. Therefore that case would, at most, only be authority in appellants' favor, had they traversed by answer the averment of non-payment, which they did not do.

It follows from the foregoing views that under the pleadings defendants were not entitled to offer evidence disproving the maturity of the indebtedness sued upon. The district court committed no error in rendering judgment for plaintiff without a trial.

Affirmed.

9 204
10 399
10 596
9 204
28 188

ELECTRO-MAGNETIC M. & DEVELOPMENT CO. V. VAN
AUKEN ET AL.

1. Section 7, Gen. Laws Colo. p. 630, which provides that “* * * an adit of at least ten feet in, along the lode, from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft,” contemplates that as to the ten feet required it might be either open or under cover, or open in part and under cover in part, dependent upon the nature of the ground.
2. In the construction of statutes, general terms are to receive such reasonable interpretations as leave the provisions of the statute practically operative.

Appeal from District Court of Clear Creek County.

THE appellees were the plaintiffs below. The complaint alleges, in substance, that on April 1, A. D. 1881, the premises known as the “Willamette Lode” was part of the public mineral domain of the United States, and open to location; and that on said date Sarah J. Arden, Charles E. Lombard and William Olmsted began to sink a discovery shaft thereon, and on May 10, A. D. 1881, discovered a well-defined crevice, at a depth of more than ten feet from the lowest rim at the surface; that on May 12, A. D. 1881, they marked the boundaries, etc., and on May 26, A. D. 1881, they executed, and caused to be recorded, their location certificate, etc.; that by mesne conveyance, the plaintiffs have become the owners, and are entitled to the possession, of the premises, and have expended \$100 on the same; that on May 17, A. D. 1882, defendants wrongfully ousted plaintiffs from the possession of the premises, etc.; that this suit is brought in support of an adverse claim, etc., against an application for a patent to the Smelter lode; that plaintiffs expended \$35 for plats and \$50 for attorney’s fees. They pray judgment for restitution of the premises and \$185 damages. For a further cause of action the complaint alleges, in substance, that plaintiffs, on March 13, A. D. 1882, and ever since, were and are entitled to the Rescue

lode; that they claim the right to occupy and possess the same by virtue of a full compliance with the laws relative to lode mining claims upon the public domain, etc.; that on May 17, A. D. 1882, the defendants wrongfully entered on a part of said premises, and wrongfully withhold the same; that this suit is brought in support of an adverse claim; that they have expended \$35 for plats, etc., and \$50 for attorney's fees. They demand judgment for a restitution of the premises; for \$100 damages, and \$85 expended in support of the adverse claim; and for costs of suit.

The answer alleges, in substance, that defendants deny the allegations contained in the first cause of action, etc.; that they deny the allegations contained in the second cause of action, etc.; that they claim the right to the Smelter lode by virtue of discovery and location on March 4, 1882, and a relocation March 20, 1882, and a full compliance with the laws relating to the discovery and location of mining claims upon the public domain. For a third defense the complaint alleges, in substance, that they are a corporation, duly organized, etc.; that on May 7, A. D. 1882, and for a long time prior thereto, they were and are the owners of, and entitled to the possession and are in the actual occupation of, the Smelter lode, etc.; and they claim the right, etc., by virtue of a full compliance with the law, etc.; that on or about May 17, A. D. 1882, they applied for a patent for the Smelter lode, including the premises in controversy.

Trial by jury, and verdict for the plaintiffs.

Messrs. MITCHELL and PALMER, for appellant.

Messrs. MORRISON and FILLIUS, for appellees.

ELBERT, J. Section 7, General Laws, 630, provides that "any open cut, cross-cut or tunnel, which shall cut a lode at the depth of ten feet below the surface, shall hold such lode, the same as if a discovery shaft were

sunk thereon; or an adit of at least ten feet in, along the lode, from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft."

In the case of *Gray v. Truby*, 6 Colo. 278, it was held that while the open cut, cross-cut or tunnel must cut the lode at the depth of ten feet below the surface, there was no such requirement in the case of an adit; that while there was no express requirement of depth, the development must always be such in its dimensions and character as to make it fairly the equivalent of a discovery shaft. In that case the evidence showed that "the appellant, in lieu of a discovery shaft, opened an adit on his lode, beginning at the surface where the lode was discovered, and running in and along the lode a distance of twenty or twenty-five feet, where it obtained a depth of eight or nine feet below the surface." In this case the evidence shows that the defendant company, in lieu of a discovery shaft, opened an adit on its lode, beginning at the surface where the lode was discovered, and running in and along the lode (well defined and with mineral) a distance of fourteen or fifteen feet, where it obtained a depth of about nine feet; that the adit, at a distance of about six feet from the point of beginning, entered cover; and that the remaining nine feet were under cover and timbered. The court below rejected the excavation made by the defendant company as not a sufficient "open cut," because it did not cut the lode at a depth of ten feet below the surface. There was no error in this. There was error, however, in rejecting the excavation as an adit because it was not under cover.

Every adit upon a hill-side, if continued, must enter cover at some distance from the point where the excavation begins,—at what distance will depend upon the inclination of the surface. Supposing the lode to outcrop, the point where the excavation enters cover, and the point where the lode was discovered, would never concur, except when the ground presented a perpendicular

face. The term "adit," as the legislature understood it, is what must govern. In this section they were legislating with reference to an actual condition of things,—with reference to mining lodes so situated as to be reached by means of horizontal excavations. To an excavation "in and along a lode" they applied the term "adit," and fixed the point where "the lode may be in any manner discovered" as the initial point from which the development was to be measured. The point at which the excavation enters cover was not mentioned, and clearly was not in contemplation. The effect of the ruling of the court was to fix "cover" as the initial point of measurement. This is in derogation of the express provision of the statute. We find nothing in the technical meaning of the word that rejects such portion of the excavation at the mouth of the adit as may be in the nature of an open cut as not being a part of the adit. As the term is used in the statute, the legislature must have contemplated that, as to the ten feet required, it might be either open or under cover, or open in part and under cover in part, dependent on the nature of the ground. In the construction of statutes, general terms are to receive such reasonable interpretation as leaves the provisions of the statute practically operative.

Although the discovery and location of the Willamette lode were prior in point of time to the location of the lode of the defendant company, there was much conflict in the testimony as to the depth of the discovery shaft. As the instructions of the court practically precluded a finding for the defendant company, it remains doubtful whether the verdict of the jury in favor of the plaintiff was not based upon that fact, rather than upon evidence showing a legal discovery shaft in the case of the Willamette. However this may be, the defendant was entitled to have the whole case submitted, under proper instructions.

The judgment of the court below is reversed, and the cause remanded.

Reversed

LEE ET AL. V. STAHL.

9	208
11	179
9	208
13	177
9	208
15	188
16	193
16	346
9	208
2a	237
9	208
20	557

1. Instructions to the jury are required by statute to be in writing.
2. Under sections 2322, 2336, R. S. U. S., where a junior mining location crosses a senior location, and the veins therein are cross-veins, the junior locator is entitled to all the ore found on his vein within the side line of the senior location, except at the space of intersection of the two veins. In such a case the junior locator has a right of way for the purpose of excavating and taking away the mineral contained in the cross-vein.
3. The effect of the provisions of sections 2336, R. S. U. S., is to exclude a cross-lode, except at the point of lode intersection, as not a subject of grant. Being exempt from the grant, the right to it is not lost by failure to "adverse." But this does not include the space of a lode intersection. If a prior locator would secure this and other rights which he has by virtue of his prior location, he must adverse, whether his prior location was made under the act of 1866 or 1872. A failure to assert prior rights is treated as a waiver.

Appeal from District Court of Clear Creek County.

THIS action was brought by the appellee, Ernest Stahl, to recover the possession of the Lone Tree lode. His patent from the government, under date of the 5th of November, 1878, reciting entry at the local land office at Central City, Colorado, on the 13th day of April, 1873, shows his title in fee. The defendant Lee is the owner of the Argentine silver lode. His patent from the government is under date of the 15th of August, 1876, and recites an entry at the same local land office, under date of July 3, 1875. The entry of the Argentine lode at the local land office being subsequent to the entry of the Lone Tree lode, the latter survey (No. 262) is excepted from the defendant's patent. The language of the patent is: "Excepting and excluding, however, from these presents, all that portion of the surface ground herein described which is embraced by said surveys No. 262, * * * as represented by yellow shading in the following plat." The two locations cross each other at a sharp

angle, near the eastern *termini*. The defendant struck a lode at or near the point of intersection by means of a cross-tunnel substantially at right angles with the Lone Tree location. From this point his tunnel runs southwesterly about three hundred and fifty feet, following generally the course of the Lone Tree location, and running directly under the Lone Tree discovery shaft. It has an average depth of about eighty feet below the surface, and is, admittedly, within the exterior lines of the Lone Tree location, with the exception of a short distance at its southwestern terminus. The plaintiff contends that this tunnel, in its entire length from the point where the lode was cut, is on the Lone Tree lode, having its apex within his side lines. The defendant contends that it is on the Argentine lode, and that its apex is at least partially within the side lines of the Argentine location. Trial by jury. Verdict and judgment for the plaintiff. Appeal.

Messrs. J. E. ROCKWELL, J. B. BELFORD and G. B. REED, for appellants.

Messrs. R. S. MORRISON, C. C. POST and JOHN A. COULTER, for appellee.

ELBERT, J. 1. The testimony offered on behalf of the defendant, in support of his allegation that his tunnel is on the Argentine vein, is unsatisfactory, and in conflict with the preponderance of evidence. We nevertheless think that there is sufficient to have taken it to the jury, and that the court erred in instructing the jury that, "under all the circumstances, they should find for the plaintiff." After such an instruction, the subsequent submission of the case to the jury was practically nominal. A further objection to the instruction containing the foregoing direction lies in the fact that it was oral, and not in writing, as required by the statute. *Montelius v. Atherton*, 6 Colo. 224. Whether what is here denominated an

"instruction" comes within the technical meaning of the term we do not inquire. Courts should avoid a practice so obviously objectionable, independent of the statutory requirement.

2. In the case of *Branagan v. Dulaney*, 8 Colo. 408, it is held that "under sections 2322, 2336, R. S. U. S., when a junior mining location crosses a senior location, and the veins therein are cross-veins, the junior locator is entitled to all the ore found on his vein within the side lines of the senior location, except at the space of intersection of the two veins. In such a case a junior locator has a right of way for the purpose of excavating and taking away the mineral contained in the cross-vein." This decision, rendered since the trial below, settles one of the principal points of contention involved in this case. The third and fifth instructions given by the court to the jury on behalf of plaintiff are in conflict with the doctrine announced. They, in effect, instructed the jury that the senior locator was entitled to the cross-vein to the extent that it was within the side lines of his location.

8. In view of a new trial, we notice a question made by defendants' counsel, that the court below erred in holding the Lone Tree patent the senior title, the entry being senior. The claim is that the discovery and location of the Argentine lode was in 1865, prior to the discovery and location of the Lone Tree lode; that priority of location, and not priority of entry, determines priority of title; that defendants' rights having accrued prior to the act of 1872, they are saved by section 2344; and that it was not necessary for him to adverse. Under the doctrine of *Branagan v. Dulaney*, *supra*, and of the case of *Hall v. Equator Mining Co.*, therein cited, the effect of the provisions of section 2336 is to exclude a cross-lode, except at the point of lode intersection, as not a subject of grant. Being excepted from the grant, it follows that the right to it is not lost by failure to adverse. But this

does not include the space of lode intersection. If a prior locator would secure this and other rights which he has by virtue of his prior location, he must adverse, and this whether his prior location was made under the act of 1866 or 1872. It is true that section 2344 provides that "nothing contained in this chapter shall be construed to impair in any way rights or interests in mining property acquired under existing laws." While this is true, other sections of the act provide the mode and manner in which such rights shall be asserted and secured by adversary proceedings, and a failure so to assert prior rights is treated as a waiver. This was held in the case of *Hall v. Equator Mining Co.*, *supra*, where the defendant made a like claim of a discovery and location under the act of 1866. The policy of the law is to require all rights and equities to the premises sought to be purchased and patented to be adjusted prior to the issuance of the patent, to the end that it may be impregnable against all comers. *Eureka Mining Co. v. Richmond Mining Co.* 4 Saw. 302, 420; *Mining Co. v. Bullion Co.* 3 Saw. 659; *Golden Fleece Co. v. Cable Co.* 12 Nev. 320; *Hall v. Equator Mining Co.* Morr. Min. (3d ed.) 286; *Gwillim v. Donnellan*, 115 U. S. 45.

This substantially disposes of all the errors assigned. A number of other points have been discussed by counsel for appellant, but in the absence of any brief on the part of the appellee, we do not consider them. They are largely speculative, and are not fairly within the issues made by the pleadings. The patents specify and define lodes crossing each other without other connection than such as arises from intersection. The pleadings allege, respectively, the rights of the plaintiff and defendant under these cross-locations. We have, therefore, confined ourselves to the law respecting such locations, and the points decided should secure for the parties a trial on the merits.

The judgment of the court below is reversed, and the cause remanded.

Reversed.

CORSON V. NEATHENY.

9 212
 3a 442
 9 212
 8a 488
 9 212
 12a 252
 9 212
 27 149
 15a 18.

1. Horse-racing is gaming, within the intent of section 850, General Statutes of Colorado, and a wager upon a horse-race is a gaming contract, and "utterly void and of no effect."
2. The authority of the stakeholder to pay the money to the winner, upon the contingency, may be revoked by either party before payment, and thereafter the stakeholder holds the deposit to the use of the depositor, who may maintain an action for its recovery.
3. After a demurrer has been overruled, the terms upon which and the time within which the defendant shall be ruled to answer is a matter of discretion, and, except when the discretion is manifestly abused, will not be interfered with by this court.
4. Mere delay on the part of the stakeholder to pay over the money is not of itself such "unreasonable and vexatious delay" as will warrant the allowance of interest, under last clause of section 1707, General Statutes of Colorado.

Appeal from District Court of San Miguel County.

THE complaint alleges — *First*, that the plaintiff resides in the county of San Miguel, state of Colorado; *second*, that on the 10th day of July, A. D. 1883, at Mark's ranche, in the county of Ouray and state of Colorado, the plaintiff deposited in the hands of the defendant, as stakeholder, divers sums of money, not exceeding the sum of \$2,000, to wit, the sum of \$885, to abide the event of wagers made between the plaintiff and divers other persons on the result of a horse-race; *third*, that on the 11th day of July, A. D. 1883, in the town of Ouray and county of Ouray, of the state aforesaid, the defendant declared to the plaintiff that such horse-race was still undecided, and the plaintiff then and there forbade the said defendant to pay over the said deposits of the said divers sums of money of the amount of \$885 to any person or persons other than the plaintiff, which said money the defendant then had in his possession; *fourth*, that on the 30th day of July, A. D. 1883, in the said town and county of Ouray, the defendant refused to deliver the said deposits of said divers sums of money of

the amount of \$885, to the plaintiff, on his demand. Wherefore plaintiff demands judgment for the sum of \$885, and interest from the date of such demand, and costs of suit.

Defendant's motion for change of venue overruled. Defendant's demurrer overruled. Court orders the defendant to answer by the incoming of court at 2 o'clock this day, to which ruling of the court the defendant excepts. Default for want of answer. Judgment for \$899. Appeal.

Sec. 162, ch. 25, Gen. St.: "All contracts, promises, agreements, conveyances, securities, and notes made, given, granted, executed, drawn, or entered into, where the whole or any part of the consideration thereof shall be for any money, property, or other valuable thing won by any gaming, or by playing at cards, or any gambling device or game of chance, or by betting on the side or hands of any person gaming, or for reimbursing or paying any money or property knowingly lent or advanced, at the time and place of such play, to any person or persons so gaming or betting, shall be utterly void, and of no effect. No assignment of any bill, bond, note, or other evidence of indebtedness, where the whole or any part of the consideration for such assignment shall arise out of any gaming transaction, shall in any manner offset the defense of the person or persons making, entering into, executing, or giving such instrument so assigned, or the remedies of any person interested therein."

Messrs. ENOS MILES and WM. STORY, for appellant.

Messrs. R. E. FOOTE and KENT and BERNICE, for appellee.

ELBERT, J. The court did not err in overruling the defendant's demurrer. The word "gaming" is held to

extend to "physical contests, whether of man or beast, when practiced for the purpose of deciding wagers, or for the purpose of diversion, as well as to games of hazard or skill, by means of instruments or devices." Horse-racing is gaming, within the intent of section 850, Gen. St. *Boughner v. Meyer*, 5 Colo. 71; *Tatman v. Strader*, 23 Ill. 493; *Shropshire v. Glascock*, 4 Mo. 536; *Boynton v. Curle*, id. 599. It follows that a wager upon a horse-race is a gaming contract, and "utterly void and of no effect." Authority to the stakeholder to pay the deposit to the winner, upon the contingency, may be revoked by either party at any time before payment, and thereafter the stakeholder holds the deposit to the use of the depositor, who may maintain an action for its recovery. 2 Chit. Cont. 919, and cases there cited; 1 Add. Cont. *363, and cases there cited; *Ball v. Gilbert*, 12 Metc. 403; *McAllister v. Hoffman*, 16 Serg. & R. 147; *Tarleton v. Baker*, 18 Vt. 9; *Wheeler v. Spencer*, 15 Conn. 28; *Perkins v. Eaton*, 3 N. H. 155; *Whitwell v. Carter*, 4 Mich. 329; *Wilkinson v. Tousley*, 16 Minn. 299; *Doxey v. Miller*, 2 Bradw. 30.

The complaint sufficiently alleges that at the time the plaintiff notified the defendant not to pay over the money deposited to the other parties to the wager the defendant had the deposit in his possession.

Nor was there error in overruling the defendant's motion for a change of venue. (1) The complaint shows the residence of the plaintiff in the county of San Miguel, and the action was properly brought in that county. Sec. 28, ch. 11, Amend. Code. At common law the action would have been *indebitatus assumpsit*, and the provision of the section respecting torts has no applicability. (2) The allegation that "the convenience of witnesses, and the ends of justice, would be subserved" by the change of venue, is not supported. The defendant in his affidavit names eleven witnesses who reside in the county of Ouray, and states that "he believes he can

prove by each of said witnesses that the said Neatheny fairly lost the race and wager on which he put up the money in the complaint mentioned." This was matter which was not and could not become an issue in the case, and evidence of it, if offered, would not have been admissible.

After a demurrer has been overruled, the terms upon which and the time within which the defendant shall be ruled to answer is a matter of discretion with the court, and, except when the discretion is manifestly abused, will not be interfered with. Sufficient time should always be given, having reference to the character of the case. The time given in this case was short,—presumably but a few hours. But as the complaint contained less than thirty lines of written matter, and but few allegations, the time given to answer it, considering the nature of the case, cannot be said to have been so manifestly insufficient and unreasonable as to justify a reversal on that ground.

Objection is made to the allowance of interest on the deposit from the date (presumably) of the demand on the defendant to the date of judgment, and we think it well taken. In the absence of an agreement to pay interest, none can be recovered, except in the cases specially provided for by statute. Sec. 1707, Gen. St.; *Hawley v. Barker*, 5 Colo. 118, and cases there cited. If the plaintiff was entitled to recover interest in this case, it was under the last clause of the section which allows interest "on money withheld by an unreasonable and vexatious delay." Whether a delay has been unreasonable and vexatious "must be determined by the circumstances of each particular case." It is manifest, however, that the legislature intended something more than a sum due, and delay in its payment. This has been repeatedly decided under a like statute. *Sammis v. Clark*, 13 Ill. 545; *Hitt v. Allen*, id. 597; *McCormick v. Elston*, 16 Ill. 205; *Newlan v. Shafer*, 38 Ill. 379; *Davis v. Kenaga*, 51

Ill. 170; *Jasoy v. Horn*, 64 Ill. 379. There is no evidence in the record to show anything more than mere delay upon the part of the defendant to pay the money on the demand of the plaintiff, and this, of itself, is not sufficient to authorize interest under this clause. For this error of the court in allowing interest the judgment must be reversed, and the case remanded, with direction to enter judgment in favor of the plaintiff for the sum of \$885 and costs, without further trial. Judgment reversed.

Reversed.

9	216
9	222
11	438

LEE ET AL. V. BALCOM.

1. Due-bills and promissory notes are regulated, and the legal effect thereof determined, by statute in this state and not by the *lex mercatoria*.
2. An instrument for the payment of money, in the following form:

"DECEMBER 20, 1882.

"Due P. Balcom the sum of two hundred and fifty dollars, value received, with interest at ten per cent. per annum after four months from date.

"GEORGE S. LEE,

"M. J. LEE, per GEORGE S. LEE,"

Held to be, in legal effect, a promissory note, and due and payable at the time of its execution.

Appeal from County Court of Arapahoe County.

THIS suit was originally commenced before George L. Sopris, a justice of the peace of Arapahoe county, by Balcom, the appellee, to recover of and from the defendants, George S. Lee and M. J. Lee, the sum of \$250, claimed to be due said plaintiff upon the following due-bill:

"DECEMBER 20, 1882.

"Due P. Balcom the sum of two hundred and fifty dollars, value received, with interest at ten per cent. per annum after four months from date.

"GEORGE S. LEE,

"M. J. LEE, per GEORGE S. LEE."

The cause was tried before the justice, February 12, 1883, resulting in a judgment for the plaintiff for the sum of money mentioned in the instrument. Defendants thereupon appealed the cause to the county court, and the trial in that court occurred June 7, 1883, also resulting in a judgment for the plaintiff, Balcom. Objections were interposed to the introduction of the instrument in evidence in both courts. Before the justice the objection was simply that it was not due; in the county court the objection was that it was not due at the time the action was commenced before the justice.

Messrs. MONTGOMERY and WAYBRIGHT, for appellants.

Messrs. CHAS. S. WILSON and T. J. O'DONNELL, for appellee.

BECK, C. J. The only errors assigned, and now insisted upon by appellants, are that the county court wrongfully admitted the said instrument in evidence, and rendered judgment thereon in favor of the plaintiff, Balcom. Appellants' theory of the case is that the above-mentioned instrument is a promissory note, due four months after date, and, if not paid at maturity, to draw interest thereafter at the rate of ten per cent. per annum. Appellee's theory is that it is an ordinary due-bill, with an interest clause added, and that the words "after four months from date," refer only to the time when interest shall commence to run, if the note remains unpaid.

Due-bills and promissory notes are regulated, and the legal effect thereof determined, by statute in this state, and not by the *lex mercatoria*. Under the provisions of the statute, any instrument in writing which either promises to pay a sum of money or article of personal property, or acknowledges any sum of money or article of personal property to be due to any other person, is construed to be due and payable to the person named therein, and to be assignable by indorsement under the

hand of the payee. An ordinary due-bill is invested with the character of a promissory note, whether it contains a promise to pay, or contains words of negotiability, or not. It is not essential even that it be expressed for *value received*. A mere acknowledgment of indebtedness is construed by the statute to import a promise to pay the same to the person named therein, or to the person or persons to whom it has been duly assigned.

The words of the statute (Gen. St. ch. 9, §§ 3, 4) are as follows:

“Sec. 3. All promissory notes, bonds, due-bills, and other instruments in writing, made by any person, whereby such person promises or agrees to pay any sum of money, or article of personal property, or any sum of money in personal property, or acknowledges any sum of money or article of personal property to be due to any other person or persons, shall be taken to be due and payable to the person or persons to whom said note, bond, bill, or other instrument in writing is made.

“Sec. 4. Any such note, bill, bond, or other instrument in writing, made payable to any person or persons, shall be assignable by indorsement thereon, under the hand of such person, and of his assignee, in the same manner as bills of exchange are, so as absolutely to transfer and vest the property thereof in each and every assignee successively.”

These sections of our statute are literal copies of sections 3 and 4 of chapter 73 of the Revised Statutes of 1845 of the state of Illinois. The Illinois statute on the subject of negotiable instruments was revised by the legislature of that state in 1874; but the legal effect of the above sections in relation to this subject was not changed.

This due-bill, then, is invested with the characteristics of a promissory note, and it would have been negotiable as such by virtue of the statute if the interest clause, and the succeeding, words “after four months from date,” had been omitted. *Laughlin v. Marshall*, 19 Ill. 390;

Stewart v. Smith, 28 Ill. 397; *Archer v. Claflin*, 31 Ill. 306; *Jacquín v. Warren*, 40 Ill. 459. The addition of the words, "with interest at ten per cent. per annum after four months from date," left the time of payment uncertain, and created a *patent ambiguity* in the instrument.

The question to be decided is whether the intention was that the sum of money mentioned therein was due at the date of the execution of the instrument or was to become due four months thereafter. This is a question for the court alone, and it is proper for the court, in the interpretation of the language employed, to bring to its aid any collateral fact or circumstance, appearing upon the face of the instrument, which may aid in its interpretation. The rule is that the form of the instrument, together with the check-marks and erasures, if any, and the technical sense in which certain words and terms are employed by established commercial usage, may be considered. The import of words and terms, so established, will be held to be the sense intended by the parties using them. Best, Ev. § 228; *Riley v. Dickens*, 19 Ill. 29.

An illustration of these principles is afforded by the case of *Hobart v. Dodge*, 10 Me. 156. A promissory note was drawn and executed, a printed form being used, containing, among other printed clauses, the words "on demand." These words were erased, by drawing through them three parallel lines. The following is a copy of the note as executed:

"BOSTON, November 25, 1831.

"For value received, I, the subscriber, of Saco, in the county of York and state of Maine, promise to pay James T. Hobart, or order, ten hundred and thirty-two dollars fifty-one cents, on demand, with interest after four months."

The same question arose in that case as in this, viz.: Did the final clause—"after four months"—relate to the time when interest should begin to run, if the note

then remained unpaid, or was it the intention of the parties that the note should mature *four months after date*? Under the principles of construction above mentioned, the question was easily decided, for valuable aids to a correct interpretation existed within and upon the face of the instrument. The court held the presumption to be that the note was signed after the erasure of the words "on demand;" that these words were erased for some purpose and by consent of the parties. The erasure of the words mentioned indicated that it was not intended to make the note payable on demand, and since the only time clause to which the "promise to pay" could relate was the "four months" clause, it was held to be intended as the time of payment.

The question here presented is more difficult than that in *Hobart v. Dodge* for the reason that the instrument to be construed contains no clear indications of intention. There are neither erased words nor check-marks to guide us to the meaning of the parties. The construction placed upon the above-described promissory note furnishes no precedent for this case, for the reason that its form and phraseology are unlike the instrument in this case; and the further reason that the controlling circumstance which guided the court to the intention of the parties in the case referred to does not exist in the present case. It will be observed that one instrument is similar in form to a promissory note while the other is in the form of a due-bill. For the purpose mentioned, it is immaterial that both instruments would be, in legal effect, promissory notes under our statute. The two classes of instruments exist irrespective of the statute. Both classes are held to import promises to pay, but in one class the promise is verbally expressed, while in the other class the promise is usually implied, and no day for performance specifically mentioned. By virtue of the statute the term "due," although not connected with or relating to a time clause, as "on demand," or upon a day certain, imports both an

acknowledgment of an existing indebtedness and a promise to pay the same. It does not follow, however, that a patent ambiguity can be aided by substituting for the word "due" the words "I promise to pay." This would change the phraseology, whereas the intention of the parties must be ascertained from the phraseology which they used, aided in the manner stated. The common as well as the statutory signification of the word "due," when not qualified by a time clause, is that the money or property in the due-bill mentioned is due at the time of executing the instrument. This is not an unusual form for such instruments.

Had the instrument in question consisted only of the following portion thereof, viz.: "December 20, 1882, due P. Balcom the sum of \$250," it would have constituted a formal due-bill by the law merchant, and, in legal effect, a negotiable promissory note under the provisions of the statute. In such case, also, it would be held that the sum of money mentioned would have been due at the date of its execution. It is clear, therefore, that the addition of the interest clause (an unusual appendage to this class of paper) has created the uncertainty as to the time of maturity. We are of opinion that the proper rule of construction applicable to the case is to give the word "due" its ordinary legal meaning and to make the concluding clause of the note, "*after four months from date,*" refer to the next antecedent subject, viz.: "with interest at ten per cent. per annum," making the interest, and not the principal, payable "*after four months from date.*" This view of the case is sustained both by the peculiar phraseology of the instrument and by well-established rules of construction. *Shaw v. Shaw*, 43 N. H. 170. The legal rule for the construction of a paragraph, where prior and subsequent clauses are so constructed as to render the meaning obscure and doubtful, is applicable, viz.: that an ambiguous phrase is given no weight as against one that is clear and certain. "It

would be a poor rule," said Mr. Justice Stuart in *State v. Williams*, 8 Ind. 191, "to reject what is clear in order to give effect to what is obscure."

In accordance with the foregoing rules and principles of construction, the instrument was due and payable at the time of its execution. The judgment is accordingly affirmed.

Affirmed.

LEE ET AL. V. WILSON.

Appeal from County Court of Arapahoe County.

BECK, C. J. It having been stipulated by the parties in this case that it should abide the decision to be rendered in the case of *Lee v. Balcom*, ante, and the judgment in that case having been affirmed, the same judgment will be entered in this case.

TODD ET AL. V. DE LA MOTT.

1. Under the statute the right of appeal from the county to the district court is conferred only upon the party against whom the judgment has been rendered.
2. A motion filed after the adjournment of the court, and not acted upon, is not such an appearance as to give the court jurisdiction over the person filing the motion.

Error to District Court of Park County.

THE facts are stated in the opinion.

Mr. M. J. BARTLEY, for plaintiffs in error.

Messrs. R. D. THOMPSON and WILKINS and BAILEY, for defendants in error.

9 228
16 144
9b 222
21 13
9b 222
11a 479

BECK, C. J. The present action was originally instituted in the county court of Park county, by De La Mott, the defendant in error. His complaint alleged that the East Leadville Mining Company was indebted to him for labor performed upon various mines, and for mining materials and merchandise, amounting in the aggregate to the sum of \$1,998.27. The company demurred to the complaint, and, upon the overruling of the demurrer, answered, denying each and all of the claims stated in the complaint, and denying that said copartnership was, in any manner, indebted to the plaintiff. The case was tried to the court, a jury being waived, on the 22d day of August, 1881, and resulted in a finding and judgment for said plaintiff, De La Mott, in the sum of \$307.71. Being dissatisfied with his judgment, he prayed an appeal to the district court of said Park county, which was granted, and the cause was tried *de novo* in the said district court. At the December term, 1881, the defendant made no appearance therein, and the plaintiff recovered judgment for the full amount of his claim, \$1,998.27. The mining company has brought the cause to this court for review by writ of error.

The errors assigned deny the jurisdiction of the district court to entertain an appeal from the county court in a cause wherein the judgment was in favor of the appellant. The statute then in force, authorizing appeals from the county court to the district court, provides that "*appeals may be taken from all final judgments or decrees of said county courts to the district court of the same county, by any one of the parties against whom any such final judgment may have been rendered,*" etc. Gen. Laws, § 575. It will be observed that the *right* of appeal is conferred only upon the party *against whom the judgment has been rendered*. The language of the statute is conclusive as to the right of appeal, and equally conclusive upon the jurisdiction of the appellate tribunal to entertain an appeal. The jurisdiction cannot be broader

than the right granted; at least, in the absence of consent of parties, which may work an estoppel under certain circumstances.

The code provision of 1879, section 26, authorizing appeals from the district and county courts to the supreme court, did not specifically limit the right of appeal to the party against whom the judgment was rendered, as does section 575, *supra*. But in construing that provision we held that the conditions upon which appeals were authorized could only apply where the party against whom the judgment was rendered was the appellant. The conditions referred to were that the appellant should pay the judgment, costs, interest and damages in case the judgment should be affirmed. *Hall v. Pay Rock Con. Min. Co.* 6 Colo. 81. The section under consideration (sec. 575, Gen. Laws), as we have seen, first limits the appeal to the party or parties against whom a final judgment or decree has been rendered. It then requires, in case of a money judgment, an appeal bond "in double the amount of the judgment or decree appealed from;" and among the conditions prescribed for the bond is the following: "And for payment of the judgment appealed from, in case said appeal shall be dismissed." That the section only gives the right of appeal to the unsuccessful party is too plain to require further consideration. This and other courts have held that where the appellate court has original jurisdiction of the subject-matter, and the parties voluntarily appear and go to trial on the merits, without exception in any form to the jurisdiction, such conduct is a waiver of the objection, and the jurisdiction cannot afterwards be questioned. *Smith v. District Court*, 4 Colo. 235, and cases cited. Although the foregoing rule is invoked in favor of the jurisdiction of the district court in the present case, it is wholly inapplicable, for the reason that the defendant made no appearance in the district court.

The point is made that defendant below waived the

question of jurisdiction by filing a motion after judgment, supported by affidavits, praying the district court to set aside the judgment, and to grant the defendant a new trial. The record shows that this motion was filed after the court had adjourned for the term, and it does not show that the court ever acted upon it. There is no force in the proposition that the jurisdiction was waived. This writ of error lies to a judgment rendered by the district court against a defendant over whom it had no jurisdiction. There was no submission of the cause, either express or implied, to the jurisdiction of the appellate court; hence its judgment is invalid.

The only mode of review of the judgment rendered in this case by the county court is by writ of error thereto from this court.

The judgment of the district court is reversed, with directions to dismiss the appeal.

Reversed.

BRUNS ET AL. V. CLASE.

1. Upon proof of the death of the sheriff, the existence of an execution issued to him while alive may be shown by testimony (1) that in the execution docket in the custody of the clerk of court there was an absence of entry for two years, covering the time of the issue of the execution in question, but that the fee-book mentions "execution issued January 8, 1878," and also the entering the sheriff's return without date; (2) that such execution was seen in the hands of the sheriff, and, by the latter's permission, examined by the party testifying.
2. Proof of a diligent and *bona fide*, but unsuccessful, search for an instrument in the place where the same belongs, is generally kept, or is most likely to be found, is sufficient to admit secondary evidence of its contents.

Appeal from District Court of San Juan County.

THE facts are stated in the opinion.

9	225
9	313
9	400
9	225
136	241

Messrs. GRAY and FRAZIER, for appellants.

Messrs. HUDSON and SLAYMAKER, for appellee.

BECK, C. J. The only error assigned and relied upon for a reversal of this case is that the existence and loss of the execution alleged to have been issued on the judgment in favor of *Sheppard & Co. v. Calder, Rouse & Co.* were not sufficiently proven to let in secondary proof of its contents. It was alleged in defendant's answer that an execution issued, and was delivered to Sheriff Williams, of San Juan county, on the 8th day of January, 1878, and was levied upon the lots in controversy. The defendant, who relied, in part, upon title derived from his purchase at the sheriff's sale, and upon the certificate of sale and sheriff's deed, was unable to produce the execution upon which the property had been sold. The decease of the sheriff prior to the trial was duly proven. It appears from the testimony that an execution docket was among the record books in the office of the clerk of the county court, but that no entries had been made in it from September, 1877, until August, 1880. This accounted for the absence of an entry therein of the issuance of the execution in the present instance. The fee-book, however, mentions the fact that an execution did issue, in the following words: "Execution issued January 8, 1878." It also mentions the entering of the sheriff's return on the execution, but gives no dates. In addition to this evidence, Mr. Hudson, one of the attorneys for the defendant, testified positively that he saw the execution in the hands of Sheriff Williams a few days after it was issued; that he asked permission to see it, and took it into his own hands, and examined it.

If the execution was lost, and could not be found at the trial, this testimony was both competent and sufficient to prove that the writ had been issued. *Supples v. Lewis*, 37 Conn. 568. It has been held that an entry in

an attorney's register was sufficient proof of the issuing of an execution to the sheriff at the time mentioned in the entry. *Leland v. Cameron*, 31 N. Y. 115, 124. There is nothing in the record to impeach the above testimony, and it having been shown that Sheriff Williams died before the trial in the district court, we are of opinion that the existence of the execution was duly established.

The remaining question is whether there was sufficient proof of the loss of the execution. That the clerk of the court is the proper custodian of the files in all actions pending or determined therein, and that the office of the clerk is the proper place of deposit of such files, do not require the citation of authorities. The law is equally well settled that proof of a diligent and *bona fide*, but unsuccessful, search for an instrument, in the place where the same belongs, is generally kept, or most likely to be found, is sufficient to admit secondary evidence of its contents. It has also been decided that the testimony of a clerk of a court that he made diligent search for certain writs of execution belonging to the files of his court, and was unable to find them, was sufficient to let in secondary evidence of their contents. 2 Best, Ev. § 482, and notes.

The witness George W. Bachman, who was the clerk of the county court from May, 1881, to May, 1883, testified that he had made diligent search on three different occasions for this paper, but failed to find it. On being asked to what extent he searched therefor, he answered: "I went through everything I could find in the office." Judge Orr, who was judge of the county court at the time of the trial, testified that the records of the county court were then in his care; that he had searched the office for the execution, but could not find it. This preliminary proof of loss seems to have gone to the full extent required by law. *Hittson v. Davenport*, 4 Colo. 169; *Hobson v. Porter*, 2 Colo. 28.

The case of *Leland v. Cameron*, *supra*, was similar to

the present case in some respects. The sheriff to whom the execution issued was deceased, and the execution had been lost. The clerk's office had been searched for the execution, and it was not found. The members of the deceased sheriff's family were inquired of, but they could not find the writ. The proof was held sufficient. Appellants make the point that the proof in the present case was not carried to the same extent as in the case last cited. We do not understand the decision to hold, or intimate, that the inquiry of the sheriff's family was necessary; but having been made, that fact is mentioned with the other acts performed, all tending to show that a diligent search had been made for the document. See, also, *Mandeville v. Reynolds*, 68 N. Y. 528. The proofs of the existence and loss of the execution were sufficient to justify the admission of the certificate of sale and the sheriff's deed as secondary evidence of the contents of the execution.

These being the only questions submitted for our consideration, the judgment of the court below will be affirmed.

Affirmed.

9	228
18	548
9	228
18	336
9	228
36	245

NEUMAN ET AL. V. DREIFURST ET AL.

1. In the absence of a provision in a written contract to pay interest at the rate of two per cent. per month, statutory interest only can be recovered.
2. Where no provision is made in a written agreement that the indebtedness of a party should be secured by a lien on his or her interest in the property, evidence of a contemporaneous parol agreement to that effect is inadmissible.
3. An action by a tenant in common against a co-tenant, for contribution for improvements, does not lie, except upon an agreement to contribute.
4. Where a bill is brought to set aside a conveyance, it is in the nature of a creditor's bill, and cannot be maintained before judgment.

Error to County Court of Clear Creek County.

THE complainant, in substance, alleges: That the plaintiffs and defendant Lizzie Neuman were the owners of a certain mining claim known as the "Atlantic Lode," and that plaintiffs and said last-named defendant owned said lode in proportion as follows: John Dreifurst, an undivided one-third; Ben Werner, an undivided one-third; John Bernhardt, an undivided one-sixth; and defendant Lizzie Neuman an undivided one-sixth; that for the purpose of working and mining said lode in the most economic and miner-like manner, and to develop the same, it became necessary to drive a tunnel to intersect the vein of said lode; that in order to procure the necessary means for driving said tunnel it was necessary, and was so agreed by the owners, to mortgage said lode, and it was further agreed that the said owners would all enter into said mortgage; that pursuant to said agreement, sometime in December, 1878, the plaintiffs borrowed the sum of \$1,100 for the purpose of driving said tunnel, but said defendant Neuman refused to enter into said mortgage with her co-owners to secure said loan; that said plaintiffs then executed and delivered their mortgage to secure said loan upon the undivided five-sixths of said Atlantic lode; that plaintiffs then drove said tunnel, and expended in so doing the sum of \$1,100, and were compelled to further borrow the sum of \$600 to complete said tunnel; that the plaintiffs then gave their mortgage on the undivided five-sixths of said mining lode for the sum of \$1,700, which said last mentioned sum included both loans, and that the said mortgage bore interest at the rate of two per cent. per month; that at the making of each and all of said loans said defendant Lizzie Neuman promised and agreed to and with said plaintiffs to bear and pay her proportional share thereof, as well as the interest accruing thereon, and all other necessary expenses pertaining thereto; that plaintiffs drove the tunnel as an improvement and development of said Atlantic lode, and afterwards had an

accounting with defendant Neuman, when she was found to owe plaintiffs the sum of \$646.37, and she agreed that this indebtedness should be a lien on her interests until it was paid, "and that said sum should be paid and discharged out of her (the said Lizzie Neuman's) interest, out of any royalty for mineral taken from said Atlantic lode;" that in pursuance of said verbal agreement, so entered into as last herein set forth, said Lizzie Neuman, on the 11th day of March, 1882, executed and delivered to plaintiffs her contract or agreement in writing, in words and figures as follows, to wit:

"Whereas, the owners, John Dreifurst, Ben H. Werner and John Bernhardt, have heretofore run the Atlantic tunnel for the purpose of intersecting and developing the Atlantic lode, on Sherman mountain, Clear Creek county, Colorado; and that there is now an indebtedness on said tunnel amounting to each sixth interest in said tunnel and lode of the sum of \$646.37: now, therefore, I, Lizzie Neuman, being the owner of one-sixth interest in said Atlantic lode, do hereby agree with the other co-owners that the royalty derived from the leasing of said lode, to whoever may lease the same, shall first be paid and applied towards the payment of such indebtedness, to the extent of my sixth interest.

[Signed]

"LIZZIE NEUMAN.

"Georgetown, March 11, 1882."

That the loans made by plaintiffs, and secured by the said mortgages, bore interest at the rate of two per cent. per month; that defendant's *pro rata* share of this interest was \$5.66 per month, from the date of the mortgages to the present time, and that this interest was laid and paid out by plaintiffs for said defendant; "and in the month of July, 1882, plaintiffs paid the tax for said Atlantic lode, the *pro rata* share of which to each sixth interest was \$1.54, whereby said Lizzie Neuman became indebted to plaintiffs in the further sum of \$1.54, her share of said taxes, and that the total indebtedness of

said Lizzie Neuman, being interest and taxes aforesaid, is the sum of \$69.54;" that from March 10, 1882, the said lode produced \$963.40, from which the one-sixth interest of Lizzie Neuman was applied in pursuance of the above contract; that the balance due from Lizzie Neuman is \$555.37; that defendants combined and confederated to cheat and defraud plaintiffs, by defendant Lizzie Neuman, on March 15, 1883, making and delivering to her co-defendant (Anton Schueler) herein a warranty deed, conveying the lode mentioned in the contract, and conveying to him a one-third interest therein, for a consideration stated in the deed of \$600; that said conveyance was fraudulent, colorable, and without consideration, and that said grantee knew it was given in fraud, and to cheat and defraud plaintiffs. Prayer (1) for judgment; (2) that a lien be granted on the lode; (3) that Schueler's deed be declared null and void; (4) that said lien be enforced against said property. General and special demurrer filed to complaint. Motion filed by plaintiffs for leave to strike out of paragraph 6, all relating to taxes, allowed. Judgment of the court overruling the demurrer. Decree in accordance with the prayer of the bill.

Mr. W. T. HUGHES, for plaintiffs in error.

Messrs. THOS. J. CANTLON and C. C. POST, for defendants in error.

ELBERT, J. This is an action by tenants in common against a co-tenant for contribution, upon an alleged agreement to contribute for improvements. The allegations of the complaint show plaintiffs entitled to judgment against the defendant for her *pro rata* share of the expense of driving the tunnel. To this extent the complaint states a cause of action. The liability of the defendant rests on an alleged promise to contribute, made prior to the commencement of the work in 1879. While, by the terms of the agreement of March 11, 1882, certain

royalties coming to the defendant are to be applied in payment of the amount due, there is no agreement upon the part of the plaintiffs, either express or implied, to look to this fund exclusively for payment. It was still competent for them to sue at any time upon the original promise to contribute for the amount admitted to be due March 11, 1882. The agreement of March 11th appears to be the result of an accounting at that date of expenses incurred in driving the tunnel, and by it the defendant in this behalf admits an indebtedness to the plaintiffs of \$646.37. For this amount, less the proper credits, the plaintiffs were entitled to judgment, with statutory interest from the date of settlement. Gen. Laws, 513. This settlement must be taken to have included all interest due the plaintiffs up to that date. If there was an agreement to thereafter pay two per cent. on the amount found due, it should have been provided for in the written contract. In the absence of any such provision, statutory interest only can be recovered. It was error for the court to allow interest at the rate of two per cent.

The court also erred in decreeing a lien on the lode. There is no provision in the agreement of March 11th that the indebtedness of defendant shall be secured by a lien on her interest in the lode, and evidence of a contemporaneous parol agreement to that effect, as alleged in the complaint, would not be admissible. An action by a tenant in common against a co-tenant for contribution for improvements does not lie, except upon an agreement to contribute. Washb. Real Prop. *421. In partition, it is true, courts will adjust the equities of the parties in this behalf, and in other cases a lien has been raised as against other creditors, but we fail to find any case like the one at bar where a lien has been decreed. The indebtedness here arises upon contract, and stands upon the same footing as any ordinary indebtedness arising *ex contractu*, with respect to which the creditor must pursue his remedy at law, and to secure which a court should

not go outside of the contract of the parties, and decree *ex æquo et bono* a lien on the estate of the debtor.

A further objection to the complaint lies in the fact that it seeks to set aside the conveyance by the defendant Neuman to the defendant Schueler. In this respect the complaint is in the nature of a creditor's bill, which cannot be maintained before judgment. *Burdsall v. Waggoner*, 4 Colo. 256; *Allen v. Tritch*, 5 Colo. 222. In the meantime the attachment act affords the plaintiffs a remedy against any fraudulent transfer.

The judgment of the court below is reversed and the cause remanded, with directions to dismiss the complaint as to the defendant Schueler, and with leave to plaintiffs to file an amended complaint.

Reversed.

KOLLENBERGER ET AL. V. THE PEOPLE.

1. Section 22 of "An act to provide for the branding, herding and care of stock" (paragraph 3190, Gen. St.) is part of a special act, the effect of which is not to take a larceny of any of the animals out of the provisions of the general act, but to leave it indictable under either act.
2. All statutes *in pari materia* are to be construed together. Repeals are not favored. Whenever the earlier and the later provisions of the law can stand together they will be permitted to do so.
3. The words in an indictment "the same being living animals" may be rejected as surplusage.
4. Evidence of threats made after the confession of accused is *clearly inadmissible*.
5. A general verdict is according to the course of the common law, in conformity to which all trials for criminal offenses are to be conducted, except where a different mode is pointed out.

Error to District Court of Arapahoe County.

INDICTMENT for larceny: * * * "The grand jurors chosen, selected, impaneled and sworn, within and for the county of Arapahoe, in the name and by the author-

9	238
19	139
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10s	456
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26	541
9	233
632	138

ity of the people of the state of Colorado, upon their oaths, present that William Kollenberger and Charles Huff, late of the county of Arapahoe aforesaid, on, to wit, the 6th day of July, A. D. 1882, in the county of Arapahoe aforesaid, in the state of Colorado,—two calves, of the value of \$15 each, the same being living animals; and two other calves, of the value of \$15 each; and three hundred pounds of veal, of the value of ten cents per pound; and two calf hides, of the value of \$1 each,—of the property, goods and chattels of one William A. Hamill, then and there being found, feloniously did take, steal, lead, drive and carry away, with an intent to steal the same, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the state of Colorado.”

Trial. Verdict of guilty, and defendant sentenced to imprisonment in the penitentiary. Writ of error to the supreme court.

Section 65 of the Criminal Code: “Larceny is the felonious stealing, taking, and carrying, leading, riding or driving away the personal goods of another. Larceny shall embrace every theft which deprives another of his money or other personal property, or those means or muniments by which the right and title to property, real or personal, may be ascertained. Private stealing from the person of another, and from a house in the day-time, shall be deemed larceny. Larceny may also be committed by feloniously taking and carrying away any bond, bill, note, receipt, or any instrument of writing or value to the owner. Every person convicted of larceny, where the article or thing stolen shall exceed the value of \$20, shall be punished by confinement in the penitentiary for a term of not less than one year nor more than ten years.” As amended by acts 1881, substantially the same prior thereto.

Section 22 of “An act to provide for the branding, herding, and care of stock” (Gen. St. p. 931:) “Any

person who shall steal, embezzle, or knowingly kill, sell, drive, lead, or ride away, or in any manner deprive the owner of the immediate possession of, any neat cattle, horse, mule, sheep, goat, swine or ass; or any person who shall steal, embezzle, or knowingly kill, sell, drive, lead, or ride away, or in any manner apply to his own use, any neat cattle, horse, mule, goat, sheep, ass or swine, the owner of which is unknown; or any person who shall knowingly purchase from any one not having the lawful right to sell and dispose of the same, any neat cattle, horse, mule, sheep, swine or ass, shall be deemed guilty of a felony, and, on conviction thereof, in any court of competent jurisdiction, shall be punished by imprisonment not exceeding six years, or by a fine not exceeding \$5,000, at the discretion of the court." Act of March, 1877.

Messrs. GEO. W. MILLER and JOHN D. ELLIOTT, for plaintiffs in error.

The Attorney-General, THEO. H. THOMAS, for the People.

ELBERT, J. Section 65 of the Criminal Code (paragraph 753, Gen. St.) defines the crime of larceny, and is a general provision. Section 22 of "An act to provide for the branding, herding and care of stock" (sec. 3190, Gen. St.) is part of a special act. The effect of this last act is not to take a larceny of any of the animals therein named out of the provisions of the general act, but to leave it indictable under either act. To this extent the two provisions are concurrent. All statutes *in pari materia* are to be construed together. Repeals are not favored. Whenever the earlier and the later provisions of the law can stand together, they will be permitted to do so. Bish. St. Crim. § 123 *et seq.*; *id.* § 164 *et seq.*

There is no ground, therefore, for saying that the indictment in this case charges two distinct felonies under two different statutes. It is the common case of an indictment for larceny where various goods and chattels, the subject of a single larceny, are joined in one count, and where proof of the larceny of any one of them sustains the indictment. Such a count is *not bad for duplicity*. 1 Whart. Crim. Law, § 391.

The indictment is good under the general act, and follows its language so closely as to leave no doubt that it was drawn with reference to it. The words in the indictment, "the same being living animals," may be rejected as surplusage. When animals are stolen alive, it is unnecessary to state them to be alive. The law presumes this, unless the contrary is stated. When dead, that fact must be stated. 1 Whart. Crim. Law, § 359. But one offense being charged, no case was presented requiring the prosecuting attorney to elect which offense he would prosecute.

The evidence upon the trial below was sufficient to warrant the jury in finding the defendants guilty of the larceny of the two calves mentioned in the indictment. Evidence of threats made *after* the confession of the defendant Huff was clearly inadmissible. Such threats could in nowise have influenced his confession prior thereto. Nor is the objection to the verdict, on the ground that it is general, well taken. A general verdict in such a case is "according to the course of the common law," in conformity to which in this state all trials for criminal offenses are to be conducted, except where a different mode is pointed out. Sec. 272, Crim. Code (Gen. St. 960).

Whether the special act modifies the punishment prescribed by the general act, whenever the subject-matter of the larceny comes within the provisions of the special act, need not be considered, for the reason that the terms

of imprisonment to which the prisoners in this case were sentenced are within the shorter term prescribed by the special act.

We find no substantial grounds for reversing the judgment of the court below, and it is accordingly affirmed.

Affirmed.

RICE v. GOODRIDGE ET AL.

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8a	238

1. Errors, under the rule of this court, must be particularly specified.
2. Where a party stipulates that written instructions may not be given to the jury prior to the arguments, as provided by statute, cannot be heard, upon appeal, to found any complaint upon a right thus waived.
3. It is the duty of the court to make any and all corrections of the instructions, when reduced to writing, necessary to their validity.

Appeal from County Court of Arapahoe County.

THE appellees, Goodridge & Marfell, brought suit before a justice of the peace against the appellant, Rice, to recover upon a bill for lime furnished by said firm upon the order of one I. N. Marcy. The original amount of the bill was \$226.50, but it appeared to have been reduced to a balance of \$169.50 by two payments credited thereon as made by the defendant, one of \$25 and the other of \$32. The justice rendered judgment in favor of the plaintiffs for the sum of \$135.60, from which judgment the defendant appealed to the county court. On trial in the county court, to a jury, a verdict for \$174.45 in favor of the plaintiffs was returned, and judgment entered thereon.

The origin of the transaction was as follows: B. H. Bayles, of the city of Denver, entered into a contract with Marcy, who was a contractor and builder, for the erection by Marcy of two double brick dwelling-houses, upon certain premises of Bayles, situated in Denver. The contract obligated Marcy to provide, at his own ex-

pense, all materials and labor for the construction of these buildings; to erect the same according to the plans and specifications of the contract; and to have them completed and ready to turn over to Bayles by a certain date mentioned, under penalties therein provided for non-compliance with the terms of the contract. The contract price of the whole undertaking was the sum of \$16,475, to be paid in ten separate instalments, each one to become payable when the work should reach a certain stage of advancement, particularly described in the contract. Bayles required the contractor, Marcy, to furnish security for the performance of the contract, in the manner and within the time mentioned therein. Defendant Rice executed to Bayles his bond, guarantying the performance of the contract on the part of Marcy; and it appears that, in order to protect himself, he required that all moneys to be paid by Bayles to Marcy should pass through his hands, to be by him paid out for labor and materials, on the order of the contractor. Marcy agreed to this arrangement, and executed a written order to Bayles, to pay all moneys to become due him on said contract over to Rice. The plaintiffs, Goodridge & Marfelt, being requested by Marcy to furnish lime for the buildings, one of them (Goodridge) applied to Rice for information as to the provisions made for the payment of bills for materials, and who was to pay them. Such information was given as induced the plaintiffs, according to their testimony, to furnish the lime mentioned in the bill sued on. After the lime had been furnished, and the bill therefor made out, Marcy wrote the following order: "*Mr. S. A. Rice: Please pay the above bill, and charge to the Bayles contract. IRA N. MARCY.*" On presentation to Rice he refused to pay the bill, and in from one to two months thereafter suit was brought thereon.

Mr. J. W. HORNER, for appellant.

Mr. WM. B. MILLS, for appellees.

BECK, C. J. The trial in the county court being *de novo*, and there being no written pleadings in the case, we must depend upon the proceedings had on that trial for the respective theories of the plaintiffs and defendant as to the basis of the right of recovery on the one side, and the defense thereto on the other.

The first error assigned relates to the admission of incompetent and irrelevant testimony. This assignment is not specific, as required by our rules, and we will therefore notice only such objections raised in the argument as relate to the basis and right of recovery. *Colorado Cent. R. Co. v. Smith*, 5 Colo. 160; *Hanna v. Barker*, 6 Colo. 303.

In order to pass upon the competency of the testimony, it is necessary to inquire into the legal *status* of the defendant Rice, and into the nature and extent of his undertakings. A review of the whole record, including the testimony, rulings and instructions, indicates very clearly that the plaintiffs based their right of recovery upon the legal duty of the defendant to pay their account out of the building fund; all of which, by the arrangements, undertakings and agreements of Bayles, Marcy and Rice, was to pass through the hands of Rice, to be by him paid out for materials and labor on the orders of Marcy. Bayles, the owner of the premises on which the buildings were to be erected, required Marcy to give security for the faithful performance of his contract in accordance with its conditions and specifications. Rice became the guarantor of the contract by the execution of a bond to that effect to Bayles. Rice, for his own protection, required Marcy and Bayles to so modify their agreement that all moneys payable to Marcy under the contract should be paid to Rice. This was effected by an order, executed by Marcy and addressed to Bayles, directing him to make all payments to Rice, which was done, as the testimony shows, upon Rice's agreement to pay out the money for materials and labor on the orders

of Marcy. We conclude, therefore, that, by virtue of the agreements and arrangements so made by the parties, Rice became the trustee or custodian of the funds, with the imposed and accepted duty of paying the same out upon the orders of Marcy, on bills for labor performed and materials furnished for the erection of the buildings. This, we think, is the legitimate conclusion to be reached from a consideration of the testimony and proceedings contained in the record, and we think the testimony of the defendant himself supports such conclusion.

The appellant seems to rely, for a reversal of the judgment obtained against him, mainly upon the proposition that the recovery was claimed and obtained on an alleged promise of Rice to become personally responsible for the payment of these bills. But this last proposition is not supported by the record. In our judgment, it is inconsistent with everything therein contained, except the oft-repeated declaration of the defendant that he declined to become personally responsible. Plaintiffs sought to recover a personal judgment against the defendant, but this was based on the ground of a misapplication by the defendant of funds intrusted to him for the payment of this account, and his failure and refusal to pay the same out of such funds, and not upon a promise to become personally responsible as a contractor.

Among other objections urged to the admission of evidence are objections to the introduction of the building contract; the bond of the defendant guarantying the performance of the contract; the order of Marcy to Bayles to pay Rice all moneys accruing to him on the contract; and the oral testimony tending to show when the estimates severally became payable; also whether the same were in fact paid to defendant Rice as they matured, or about the times of the maturity thereof. We perceive no error in the admission of any of this evidence. So far as the documentary and written evidence is concerned, it was competent for the following purposes,

that is to say: The contract, to show that the total amount of money to be paid by Bayles for the construction of the building was to become due and payable in ten instalments, or "estimates," as they were termed by the counsel and witnesses; that those estimates were of different amounts, and not payable at stated periods of time, *but payable at certain stages of the work*, particularly specified in the contract. The bond was competent to show the relation which Rice occupied with respect to the parties, and his interest in the faithful performance of Marcy's contract; and the order on Bayles to pay over the funds to Rice was corroborative of Rice's alleged undertaking to pay out the moneys for materials and labor upon the orders of Marcy. The purpose of the oral testimony referred to in the objection was to show payment to Rice of the instalments as they matured; and particularly to show that before suit brought he had received money from Bayles, properly applicable to the payment of the plaintiffs' bill for materials which he had refused and neglected to pay.

The fourth error assigned is that the verdict was contrary to the evidence, and rendered without regard to the instructions of the court. A review of the whole evidence, in our judgment, authorized the jury to find that all the conditions existed which established the liability of the defendant to pay the bill sued upon. It was not disputed that the materials mentioned in the bill were furnished by the plaintiffs for these buildings; that the bill was correct; and that the defendant was directed by Marcy to pay it by an order indorsed thereon; also that Rice refused to pay it. The evidence shows that the plaintiffs brought themselves into privity of contract with the defendant in respect to his undertaking to pay these bills. This is shown by the testimony of both parties. Goodridge details an interview between himself and Rice, had, as he says, before furnishing any materials for the buildings. As to the time of the interview he

is supported by the testimony of Marcy, and contradicted by the testimony of Rice. Goodridge swears that he told defendant that Marcy had applied to his firm to supply materials for the Bayles buildings, and had informed them that he (Rice) was going on his bond; also that they did not want to supply any materials until they knew who would pay for them. Mr. Goodridge testified further: "I asked him if he would be responsible for the payment of the bills for materials. He said he was to receive the money for the whole of the work. No money was to pass through Marcy's hands. As the work progressed, and materials were furnished, he would pay the bills." This is all there is in the case on which to found the charge that the recovery was based upon an alleged promise of Rice to become personally responsible. The question was asked the defendant whether he would become responsible for the payment of the bills. Defendant's answer, according to the testimony of both parties, was substantially a promise to carry out the arrangements before mentioned which had been made for the payment of the bills. Rice nowhere promised to pay out his own money. It was only "as the work progressed" that any money from Bayles would be received by him. When it had progressed far enough to make an instalment due, and when the same was paid over to him, it then became his duty, upon the orders of Marcy, out of this money to pay the bills for labor and materials that entered into that particular estimate or instalment. If the amount of any estimate should fall short of paying all the bills included within it, defendant would not be liable to pay the balance thereof until supplied with money for this purpose. These were the inferences which we think the jury were authorized to draw from the entire testimony.

The defendant says this interview was after most of the lime had been delivered, but he is evidently mistaken in this, since both Goodridge and Marcy agree that the

interview occurred before any lime was furnished, to wit, September 5, 1881. Defendant further denies that Goodridge spoke to him about lime at all, saying the conversation was about brick. This is wholly immaterial, for he admits the plaintiff used these words: "That Marcy had been to Goodridge & Marfell to supply material for the Bayles buildings; that I was going on the bond, and he didn't propose to furnish any material until he knew who would pay for it." Here, then, was a direct inquiry, calling for the disclosure of defendant's relations to the building contract, and to the parties thereto; also for information as to the extent of the defendant's liability. The substance of defendant's replies to Goodridge, as stated by himself, is: "I told him I would be bondsman, and as bondsman would receive the money; that I would not be responsible for anything, but I would distribute the money, on Marcy's orders, to the best advantage of the building contract." This is what the defendant says he told Goodridge, but he claimed on the trial that he had a discretion as to preferring certain classes of bills for payment over other bills, and that his meaning was: "Labor bills must be paid first, and then the others would get their money as I had it to pay." We observe here that the defendant's liability depends upon his original undertaking, and his explanations to Goodridge concerning the same, when the latter applied to him for information as to who would pay for materials to be furnished; and that his liability cannot be limited to what he may have then secretly meant but did not disclose.

The evidence shows that plaintiffs furnished the materials in this bill upon the strength of the defendant's statement, and upon his promises to pay out the funds as above set forth. The discretion claimed by the defendant to prefer bills, in the payment of the moneys coming into his hands, rests upon his own testimony. We find no authority given him to reject payment of any bill ordered by Marcy to be paid, when funds had been supplied him

for its payment. Had Marcy attempted to divert the funds to other purposes, defendant would then have been in a position to reject payment of his orders; or if orders were drawn upon him when no funds had been supplied for their payment, he would not be liable under any view of the present case. It is to be presumed, if any such defenses in his favor existed, he would have stated the same positively, and without equivocation. Defendant's answers upon these points were indefinite and evasive. Referring to Goodridge's demand for payment of his bill, defendant says: "I told him I had no money in my hands;" but he did not swear that this statement to the plaintiff was true, nor that the instalment out of which the bill was payable had not been received, or that it was insufficient to pay all bills intended to be thereby provided for. We insert some specimens of his answers: He was asked, on cross-examination, how much money he had received up to the time this bill was presented, and if he had not received money for an estimate which included the materials in this bill. Instead of answering the question as propounded, his answer was: "I had received all that was due up to that time, excepting when it was delayed." The next inquiry was whether, at the time this suit was brought, he had received pay for all estimates, including the materials furnished in this bill. He answered: "I received all that had been paid." The following question was then propounded: "*Question.* Had any money been paid that included these materials? *Answer.* I think not." Defendant testified that there was a shortage of funds to complete the buildings, but he did not state at what point in the progress of the work the shortage occurred, or was discovered, or that it had anything to do with his refusal to pay the bill in suit. Considering the unsatisfactory character of the defendant's testimony as to whether or not he had received the money from Bayles applicable to the payment of the plaintiffs' bill, and considering also the testimony

introduced by the plaintiffs on the same point to show he did receive such money, we discover no foundation for the error charged in the fourth assignment of error,—that the verdict was contrary to the evidence.

The fifth assignment is: The verdict is excessive, and more than was asked for by the plaintiffs. The amount of the verdict was the balance remaining due on the bill, with the addition of legal interest. The only grounds relied upon for charging the verdict to be excessive are that the justice of the peace had rendered a judgment for twenty per cent. less than the amount due, and that, in a desultory conversation between the attorneys of the respective parties in the county court, plaintiffs' counsel had remarked that they could recover eighty per cent. of their bill. There is absolutely nothing in the record of the trial to warrant a finding for any sum less than the full amount of the bill, which amount was conceded on the trial to be due. There is nothing in the building contract reserving the twenty per cent., as was shown by the contract itself, and by the testimony of Marcy, save that the last instalment is a heavy one, evidently not based on a final estimate of the expense of construction, but upon the balance due on the contract. No doubt the profits of the contractor were reserved to the last or tenth instalment. The several instalments were designated throughout the trial, both by parties and witnesses, as "estimates." This term is significant, as applied to payments upon building contracts of this character, where each instalment matures upon reaching a certain stage or progress in the work. The amount of the instalment would appear to be based upon an estimate of the expenses which would be necessarily incurred in the performance of the designated portion of the contract. In such case, the presumption would be that each estimate so ascertained would be sufficient, when the money was paid, to satisfy all claims for mate-

rials furnished, as well as for labor performed upon the building, for the work specified.

The second assignment of error is: "The court erred in giving the second instruction asked for by the plaintiffs, or by his own motion." The second instruction, as finally given, was: "If you find from the evidence that the defendant promised to pay the money upon the order of Marcy, as materials were furnished, and you also find from the evidence the materials were furnished and the order given for this payment while the defendant had money in his hands, or if he received it afterwards to apply on the contract, then your verdict should be for the plaintiffs." Two principal objections are urged to this instruction: *First*, that it was not based upon the evidence; *second*, that it was modified after being given orally to the jury.

The first objection is practically the same objection which was urged against the verdict by the fourth assignment of error, already considered. There is no more ground for the objection that this instruction was not based upon the evidence than that the verdict was contrary to the evidence and opposed to the instructions. The variance claimed between the instruction and the evidence is that plaintiffs in producing their evidence sought to recover upon an alleged promise made by Rice to become personally responsible for the payment of their account, whereas this second instruction places the liability of the defendant upon his *receipt of the funds*, and the *order of the contractor to pay his bill out of the same*. It is unnecessary to again discuss this point. We have shown that it is not well taken. The inconsistency of the objections and arguments is forcibly made to appear in the discussion of the objections to the evidence under the first assignment of error. Objections were there urged against the admission of evidence tending to show the following facts: The defendant's fiduciary re-

lation to the parties; that his undertaking was to pay out the moneys to be placed in his hands by Bayles, and upon the orders to be drawn on him by Marcy; also that, in so far as the present claim is concerned, the money for its payment was placed in the hands of the defendant, and that he was ordered to pay it. This is the class of evidence the admission whereof was objected to as *irrelevant* and *misleading* to the jury; and yet, in the face of these objections to evidence introduced to show a fiduciary and not a personal obligation on the part of the defendant, which is in harmony with the view of the court as stated in the second instruction, the objection is made and insisted upon that this instruction was not based upon the very kind of evidence which the defendant sought so strenuously to keep out of the case.

The second objection to this instruction is that it was *modified* after its oral delivery to the jury. This is not a valid objection. The giving of the oral instructions was by virtue of a stipulation of the parties. The oral instructions are not before us for any purpose, and the only valid objections that could be urged to the written instructions would be such as might be assigned in other cases. By stipulation of the parties, the jury was instructed orally before the arguments, the instructions to be taken down in writing, corrected, and given to the jury after the arguments. That written instructions were not given to the jury prior to the arguments, as required by law, is due to the defendant's stipulation, and he cannot now be heard to found any complaint upon rights thus waived. It was the duty of the court to make any and all corrections of the instructions, when reduced to writing, necessary to their validity. The mere fact that this instruction was modified is not a ground of error.

The right of recovery in this case was largely a question of fact, to be arrived at from a careful examination

and comparison of the evidence, under correct instructions. We see no cause for interfering with the manner in which either the court or the jury discharged its duty. The judgment is therefore affirmed.

Affirmed.

9	248
12	91
12	407
9	248
14	10
9	248
15	126
16	283
9	248
20	409
9	248
25	451
9	248
13a	276
9	248
18a	48
9	248
35	240
37	452

WHEELER V. NORTHERN COLORADO IRRIGATION COMPANY.

1. Under the constitution the principal jurisdiction of the supreme court is first appellate, and second superintending. But there is also conferred upon it a limited original jurisdiction.
2. The phrase, "and other original and remedial writs," in section 3, article VI, of the constitution, includes writs belonging to the same class as those specifically named in said section.
3. All of the writs referred to in said section 3, save the writ of injunction, were prerogative writs of the common law, and the writ of injunction as therein provided for is made a *quasi* prerogative writ.
4. Some of the writs mentioned, including *mandamus*, have been largely shorn, in this country, of their prerogative character. But original jurisdiction over these writs should be taken by this court only in cases involving questions *publici juris*, and the writs from this court should in general be put only to prerogative uses. Except in cases presenting some peculiar exigency they should only issue when the interest of the state at large is directly involved, and where such interest is the principal and not a collateral question.
5. Cases where these writs issue from this court should be brought in the name of the people, and it is the better practice that they be instituted by the attorney-general, or with his consent, or that his refusal to act or to consent be shown.

ORIGINAL proceeding for *mandamus*.

Upon the petition presented, an alternative writ issued by order of the court. The matters averred in respondent's return thereto constitute, in legal effect, a special demurrer, and in ordinary actions would doubtless be pleaded as such. All facts essential to a correct understanding of the opinion are sufficiently stated therein.

Messrs. WILBUR F. STONE, L. C. ROCKWELL and THOMAS MACON, for plaintiff.

Messrs. HUGH BUTLER, A. B. MCKINLEY and T. D. W. YONLEY, for defendant.

HELM, J. The authority of this court to entertain the original proceeding before us is vigorously challenged by counsel for the respondent company. This objection gives rise to the most perplexing question now presented for adjudication.

Sections 2 and 3, article 6, of the state constitution read as follows:

"Sec. 2. The supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state, and shall have a general superintending control over all inferior courts, under such regulations and limitations as may be prescribed by law.

"Sec. 3. It shall have power to issue writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, injunction, and other original and remedial writs, with authority to hear and determine the same."

To these constitutional provisions we must look for the jurisdiction of the supreme court. In no other part of that instrument is there anything else specifically relating to this subject. It is wholly immaterial whether we regard the language quoted as designating grants of power, or whether, with counsel for relator, we say that a part thereof constitutes a limitation of power; for, in either event, the court possesses only the jurisdiction that is expressly mentioned or necessarily implied.

Let us briefly analyze these extracts from the constitution.

Section 2 treats of two subjects: *First*, the appellate jurisdiction of the court; and, *second*, its general superintending control over inferior courts. This section un-

doubtedly defines the principal power and authority which the framers of the constitution intended this tribunal to exercise. As the head of the judicial system of the state, it was eminently appropriate to confine its jurisdiction to a review of causes and proceedings determined by inferior courts, and to a superintending control over such courts. The general intention clearly was to leave with the subordinate courts of the state the first or original jurisdiction of controversies, whether relating to purely private rights or whether involving the consideration of questions pertaining to the public welfare. But, for excellent reasons, it was deemed necessary that this court should, nevertheless, possess a certain limited original jurisdiction. Such jurisdiction is designated in section 3. It is contended by one of the counsel for respondent that the power to issue the writs there mentioned was conferred solely to promote the efficient exercise of the authority given in the preceding section; that these writs are only to be used in aid of the appellate jurisdiction or in effectuating the general superintending control over inferior courts.

This position we consider untenable for the following reasons: *First.* Section 2 itself, by the declaration that the jurisdiction shall be appellate only, "except as otherwise provided in this constitution," implies the conferring of some independent *original* jurisdiction. *Second.* At least two of the writs designated in section 3 cannot be used in aid of appellate jurisdiction, nor are they appropriate to the exercise of a superintending control over inferior courts. *Third.* The appellate jurisdiction and the superintending control, each, without any express provision on the subject, carries with it authority to issue all writs appropriately connected with the proper performance of the duties imposed. It is an established doctrine that one of the essential attributes of appellate jurisdiction, and one of the inherent powers of an appellate court, is the right to make use of all writs known to

the common law, and, if necessary, to invent new writs or proceedings in order to suitably exercise the jurisdiction conferred. *Attorney-General v. Railroad Cos.* 35 Wis. 425; *Marbury v. Madison*, 1 Cranch, 137; *U. S. v. Commissioners*, 1 Morris (Iowa), 42; *Attorney-General v. Blossom*, 1 Wis. 277. Hence, if counsel's position be correct, section 3 is entirely unnecessary. It could be stricken out, and the authority of the court would remain wholly unchanged,—a view hardly consistent with settled rules of construction, and which we are not prepared to adopt. It is our judgment that the section confers upon this court the power to issue the writs therein mentioned *for jurisdiction*, and not in *aid of jurisdiction* previously specified.

What is the nature and extent of the jurisdiction thus given; what is the character of the writs referred to, and for what purpose may they issue?

An incidental question arises as to the meaning of the expression, "and other original and remedial writs." Similar language is found in the corresponding constitutional provisions of several other states. It has been construed to mean writs of a like nature — writs belonging to the same class or genus — as those specifically named. *Vail v. Dinning*, 44 Mo. 214; *Ex parte Allis*, 12 Ark. 116, and cases cited. This construction, though not unquestioned, appears to be sound, and is adopted without further comment.

We may, therefore, at the outset, safely assume that the ordinary summons or process by which delinquent parties are brought before courts to respond for purely private injuries was not in the mind of the constitutional convention when it framed section 3. It has been correctly asserted that the writs designated "bear no resemblance to the usual processes of courts by which controversies between private parties are settled by judicial tribunals of every grade." *Attorney-General v. Blossom*, *supra*. See, also, *Vail v. Dinning*, *supra*. On the con-

trary, it will be seen at a glance that all the writs expressly mentioned, save injunction, were prerogative writs of the old common law; and the supreme court of Wisconsin has declared that "the joinder of the doubtful writ [injunction] with the defined writs operates to interpret and restrict its use so far as to be accepted in the sense of its associates;" that this writ is, by the constitution, put to certain "prerogative uses, and made a *quasi* prerogative writ." *Attorney-General v. Railroad Cos.* 35 Wis. 425. The writ of injunction is not in itself jurisdictional, and therefore is not generally to be termed "original." But the very able opinion in *Attorney-General v. Railroad Cos.*, *supra*, satisfactorily demonstrates that for the use ordained by the constitution it is not inappropriately classed with the original common law writs, also specified. When put to the contemplated prerogative uses, it generally issues upon an information filed by the attorney-general.

Some of these writs, including *mandamus*, have been, in this country, largely shorn of their prerogative character, so far as their general use is concerned; yet in the constitutional provision before us they are intended to furnish this court with an equipment powerful for the protection of the sovereign rights and interests of the state at large, and hence possess a leading prerogative feature. We are clearly of the opinion that original jurisdiction should be here entertained only in cases involving questions *publici juris*, and that the writs from this court should, in general, be put only to prerogative uses.

But these writs are frequently invoked primarily for the enforcement of private rights, while the proceedings may also affect questions of public interest.

The language used, and the general policy indicated, by the various provisions of our constitution relating to the judicial department, construed *in pari materia*, as they should be, indicate that it was not the intention to

have the supreme court entertain original jurisdiction over controversies of the kind last above mentioned; that, even though questions *publici juris* might be indirectly or remotely involved, such cases were in general to be here considered only in the exercise of appellate jurisdiction. A different view would mar the symmetry of our judicial system. It would render the supreme court a court of concurrent jurisdiction with several inferior tribunals, in a large class of cases, when no adequate reason for the exceptional arrangement could be assigned. It would seriously impair the usefulness of this tribunal as a court of review, and thus in a measure defeat the primary and principal object of its creation. Let us accept original jurisdiction of all cases presented wherein the writs named may properly issue, simply because they indirectly relate to matters of public right, and soon but little time would be given to the appellate and superintending duties devolved upon the court.

We believe that original jurisdiction of the writs mentioned, except in cases presenting some special or peculiar exigency, should not be here assumed, save where the interest of the state at large is directly involved; where its sovereignty is violated, or the liberty of its citizens menaced; where the usurpation or the illegal use of its prerogatives or franchises is the principal, and not a collateral, question.

Other courts have considered constitutional provisions substantially the same as those now before us. In Wisconsin it is said that original jurisdiction was given to the supreme court of these prerogative writs "because they are the very armor of sovereignty,—because they are designed for the very purpose of protecting the sovereignty and its ordained offices from invasion or intrusion, and also to nerve its arm to protect its citizens in their liberties, and to guard its prerogatives and franchises against usurpation." *Attorney-General v. Blossom, supra; Attorney-General v. Railroads, supra.*

Again: "But it is obvious from what has been said, and still more from discussions of the original jurisdiction of this court in first and thirty-fifth Wis., that it is in the public right only — in the interest of the state at large in its sovereign character — that we ought to exercise jurisdiction in such cases." *State v. Baker*, 38 Wis. 79.

The supreme court of Missouri thus expresses itself: "There may be occasions when not only the interest of the citizens, but the safety and welfare of the state, may depend upon the issuance from this tribunal of its original remedial process; and for such exigencies [this] provision was made." *Vail v. Dinning*, *supra*.

That of Arkansas, after a careful review of their entire judiciary system, under the constitution of 1836, which system in its leading features strikingly resembled our own, reached the conclusion that the constitutional convention intended "to leave with the inferior tribunals the first or original cognizance of cases and controversies between private parties, as well as all controversies in which the state might be a party or otherwise interested, in which the sovereignty or sovereign rights, powers and franchises of the state are not involved." The court adds: "But * * * when the exercise of a public right or a public franchise is the subject-matter of the controversy, the convention appears to have entertained a different view, and to have deemed it a proper subject to be investigated and determined in the first instance by the highest tribunal in the state." *State v. Ashley*, 1 Ark. 309. We are aware that subsequent cases in the supreme court of Arkansas confine the writs mentioned to proceedings in aid of the jurisdiction previously specified, thus, in effect, overruling the opinion from which we quote; but *Price v. Page*, 25 Ark. 527, substantially overrules the intervening decisions as to the question now under consideration, and re-establishes the doctrine announced in *State v. Ashley*. The opinion in

State v. Ashley also holds that while the writs of *habeas corpus*, *quo warranto*, etc., were authorized to inaugurate independent and original proceedings, those covered by the expression "and other remedial writs" were to be invoked only in aid of the appellate jurisdiction or superintending control. The omission of the word "original," found in the corresponding phrase of our constitution, may perhaps affect the construction; but if it does not, and if the construction of both phrases should be precisely the same, we decline to accept the latter branch of the foregoing proposition. Upon this subject nothing need be added to what has already been said.

As above suggested, rare instances may occur when, owing to some peculiar emergency or exigency, although the sovereign power, prerogatives or franchises of the state are only indirectly drawn in question, a refusal here to take original jurisdiction would practically amount to a denial of justice. In such cases this court will sometimes issue its original process. Whether a sufficient emergency exists will depend upon the circumstances attending each particular case, and will be determined in connection with each application for original relief, as presented. But in general the view above announced will be strictly adhered to, and unless a cause directly presents as the subject-matter of the proceeding one of the grounds named, its inception will be consigned to the jurisdiction of subordinate tribunals.

Our rule 49 is in harmony with the views herein expressed, though the court has sometimes been liberal in proceeding thereunder. We have frequently declined to take original cognizance of causes, in some of which questions *publici juris* were involved. If the intimation of counsel be correct, that there are instances wherein the court has issued these original writs, and where merely private rights were the subject of controversy, or where public rights were indirectly at stake, but no extraordinary emergency existed, we can only

answer that the question now raised was in such cases wholly unnoticed; and, with the supreme court of Wisconsin, express the hope that "in future there will be more care and accuracy by counsel and court." *Attorney-General v. Eau Claire*, 37 Wis. 400.

Cases of which this court should take original cognizance, directly involving, as in general they must, questions of public right, should be brought in the name of the people. The state or the public being the main party in interest, although individual advantage may be gained, the person instituting the proceeding should appear as relator. It is also eminently fitting that such causes be inaugurated before this court by the attorney-general, or with his consent, or, at least, that the refusal of that officer to act be shown. But we do not declare such consent or refusal absolutely necessary. If the main object of the proceeding is to vindicate a public right, to protect the interest of the state in its sovereign character, to prevent the illegal use of a public franchise as against the people generally, or a considerable portion thereof, or if it be to subserve the public interest in any of the other matters heretofore mentioned, a citizen interested could probably institute the proceeding in the name of the people without consulting with the attorney-general.

It is hardly necessary to suggest that where, in one of the inferior courts, the writ is invoked solely for the "protection of a purely private right," the proceeding by *mandamus*, at least, may be in the name of the individual complaining. It is an action under the Civil Code, and such person is then the real party in interest. *Stoddard v. Benton*, 6 Colo. 508.

Let us briefly examine the case at bar in the light of the foregoing conclusions. Wheeler does not sue in the name of the people, nor style himself "relator." On the contrary, he evidently proceeds upon the theory that this is essentially an ordinary private action; for his name is used in the title as plaintiff, and the respondent

company appears therein as defendant. It is true he avers that respondent is imposing, and threatening to impose, upon other persons entitled to water from its ditch the same alleged unlawful exactions of which he complains; but he professes no authority to represent such persons, nor does he invite them to join with him in prosecuting the cause. He attempts to charge the illegal use of a public franchise, yet his sole purpose is to obtain the recognition and enforcement of a private right. The investigation of defendant's illegal conduct is merely an incident to the individual relief that Wheeler demands. A correction or prevention of a wrong resulting to the public at large, or a considerable portion thereof, from defendant's abuse of its franchise, is in no sense the primary or immediate object of the proceedings.

One inferior court, at least, would have had plenary power over the cause, but relator passes it by, avowing his private interest and convenience as his excuse for appealing primarily to the original jurisdiction of this court in the premises. He asks us to take original cognizance of the proceeding, so that his private rights may be *speedily* vindicated, and his personal interest subserved, by the consummation of his individual plans for the present irrigating season. Were we to accept original jurisdiction in this case, it is obvious that we could not consistently decline to do so on any application that would hereafter be urged upon us, where, in even a remote degree, questions *publici juris* might be involved. No exigency exists sufficient to warrant making an exception of the case as now presented. Entertaining this view concerning our jurisdiction, it would be improper for us at this time to determine the remaining questions submitted.

The demurrer to the alternative writ is sustained.

Demurrer sustained.

Mr. Justice ELBERT took no part in this decision.

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13 530

COULTER V. BOARD OF COUNTY COMMISSIONERS OF ROUTT
COUNTY.

1. The legislature has no constitutional power to provide by law that the terms of the district court of a single county shall be held every year at a place designated in the act, which is not and never has been the county seat of such county.
2. A juror who attends a court at a place where there was no legal authority for holding such court is not entitled to his fees.
3. When a statute is adjudged to be unconstitutional it is as if it had never been. And what is true of an act void *in toto* is true also as to any part of an act which is found to be unconstitutional.

THE facts are stated in the opinion.

Mr. J. A. COULTER and Mr. H. V. A. FERGUSON, for plaintiff.

Attorney-General THEO. H. THOMAS and Mr. S. S. DOWNER, for defendant.

BECK, C. J. This is an agreed case, the purpose of which is to present, for the opinion of this court, the question whether the state legislature has the constitutional power to provide by law that the terms of the district court of a single county shall be held every year at a place designated in the act, which is not and never has been the county seat of such county. The circumstances giving rise to this question grew out of an act of the last session of the legislature, approved April 8, 1885, providing for an annual term of the district court in Routt county, which had theretofore been attached to the county of Grand for judicial purposes. The objectionable provision is as follows: "In the county of Routt a term of the district court shall be held at the town of Yampa, in said county, commencing on the fourth Monday of August in every year." Laws 1885, p. 179.

The county of Routt was established by an act approved January 29, 1877. The act defines its boundaries, and by section 3 provides "that, until the county seat

shall be located as provided by law, the court for the county and the county offices shall be held at such place in the county as may be designated by the county commissioners, and, at the next general election after the passage of this act, the qualified electors of the said county of Routt shall select a county seat by ballot." It also provides, by section 7, that the county of Routt shall be attached to the county of Grand for senatorial, representative and judicial purposes. Eight years after the organization of the county, during all of which time it remained attached to Grand county for judicial purposes, it was provided by law that it should have a district court. The legislature, however, inserted the unusual, and, the defendant says, the illegal, provision that all the terms provided for should be held at a certain town, which was not the county seat.

The first objection urged against the validity of the act is that it is a special law, and as such inhibited by section 25 of article V of the constitution. In so far as the act relates to Routt county, it is certainly special; but that portion thereof which provides for the holding of terms of the district court in said county does not come within the ban of the constitution. Detaching a county from another county to which it has been attached for judicial purposes, and providing it with a district court, do not come within any of the enumerated cases of section 25; nor do such provisions come within the purview of the concluding clause of said section, viz.: "In all other cases where a general law can be made applicable, no special law shall be enacted." For the purpose just stated a general law would have been inapplicable, and, if the legislature had stopped here, no provision of the act would have been obnoxious to the objections now urged. It was wholly unnecessary to name a place for the holding of the terms of the district court, inasmuch as the place for holding the same, in every county in the state, had previously been fixed by a general law, which was

then in force. Gen. St. ch. 31, § 1, p. 389. Designating the town of Yampa as the place where the court should be held, may, therefore, be treated as a separate and independent provision. It is not so connected with the subject-matter of the act, to wit, the establishment of an annual term of court in said county, as to make it a dependent or necessary provision, without which the presumption would obtain that the legislature would not have granted the court without the provision fixing permanently the place for holding its sessions. The subject-matter of the act, then, does not necessarily fall, although the objectionable provision be declared invalid. Cooley, Const. Lim. 178; *People, etc. v. Rucker*, 5 Colo. 455.

Can that portion of the act designating the town of Yampa as the permanent location of the court be sustained? The plaintiff relies, in support of the validity of this provision, upon the proposition that the fixing of the place where the court shall be held was within the discretion of the legislature, and consequently cannot be questioned by this court. We have held that the question "whether a general law can be made applicable, or whether a special law is authorized for a purpose not falling within the enumerated or prohibited cases, is peculiarly a legislative question;" that "the same presumption obtains that the members of the general assembly will exercise an honest and conscientious judgment in such cases as prevails concerning the judgments of courts." Consequently it is to be presumed, upon the passage of a special statute, that, in the judgment of the law-makers, after full and fair investigation, a general law would not effect the purpose designed to be accomplished. *Carpenter v. People*, 8 Colo. 116; *Brown v. City of Denver*, 7 Colo. 305. But the jurisdiction of the courts to review acts of the legislature, supposed to have been passed under the assumption of discretionary powers, has ever been maintained. While the presumptions of good faith and sound judgment attach to the acts of

legislative assemblies, it is well known that they are liable to commit grave mistakes. To hold that the enactment of a provision involving a palpable abuse of discretion, or that the assumption of discretionary power, in a case clearly inapplicable to the rule, cannot be judicially reviewed and annulled, would, in our judgment, subject the courts to well-merited criticism for inefficiency in the performance of their judicial functions. The present instance furnishes an example of what would be the result of such a doctrine. Here is a provision in a legislative enactment which appears to us to violate both the letter and the spirit of the constitution. Whether it was an attempt to exercise a supposed discretionary power, or a mere error of law, is immaterial. The existing state of the law, as well as the legislation of both the territory and state, clearly demonstrate that not only a general law was applicable for the purpose, but that the general laws in force at the time of the passage of this act were amply sufficient, and that no provision whatever was necessary on the subject.

The territorial legislature, by an act approved January 10, 1868, provided that the "*terms of the district court shall hereafter be held in the said districts at the county seats of the several counties therein, as the said county seats now are or hereafter may be established.*" Laws 1868, p. 264. Changes were subsequently made, from time to time, as to the organization of the several judicial districts, the number of terms of court to be held in the several counties, and the times of holding the same; but in every instance the requirement that the courts should be held at the county seats of the several counties was reenacted or retained. See acts approved February 11, 1870 (Laws 1870, p. 59); February 9, 1872 (Laws 1872, pp. 89-91); February 13, 1874 (Laws 1874, pp. 88, 90, 92); February 8, 1876 (Laws 1876, p. 66). The act last mentioned was passed by the last territorial legislature that ever convened.

The state of Colorado was admitted into the Union under its constitution on the 1st day of August, 1876, by the proclamation of the president of the United States of that date. The general assembly of the state, at its first session, which commenced November 1, 1876, by an act approved December 18, 1876, repealed the territorial acts relating to the judicial districts and the holding of district courts therein, and enacted new provisions concerning the same. It divided the state into *four* judicial districts, instead of *three*, as provided by territorial regulations; apportioned thereto the several counties of the state, assigning to each district certain counties; and made provision for the holding of courts in the respective counties. The first section of said act re-enacted the same provision in respect to the *place* where the courts should be held, which was contained in the territorial act of January 10, 1868. It reads as follows:

"Sec. 1. Terms of the district court in the respective judicial districts in the state shall, after the year 1876, be held in said districts at the county seats of the several counties therein, as the county seats now are or may hereafter be established, commencing on the days following in each and every year." Gen. Laws, 349.

At the legislative session of 1881 the state was again re-organized in respect to the district courts, the number of judicial districts being increased to *seven*. Again it was enacted, by a law approved March 5, 1881, that the sessions of said courts should be held at the county seats of the several counties. Laws 1881, p. 105.

Thus the law stood in the territory and state of Colorado for a period of seventeen years, during all of which period the permanent location for the holding of terms of the district courts was fixed by general law applicable to the whole commonwealth. This general law was in force at the time of the passage of the act in question. The only exceptions to the above rule were upon the organization of new counties, when the legislature some-

times provided that, until a county seat should be selected by the citizens of the new county, a certain place designated should be *temporarily* the county seat; or, in some instances, a place was designated for the holding of courts until a county seat should be selected by the citizens. For this court to hold, in the light of the foregoing legislation, and in face of the constitutional provision respecting special legislation, either that a general law was inapplicable in the present case, or that the legislature of 1885 was vested by the constitution with discretionary powers to decide that a special enactment was necessary to fix a permanent location for the sessions of the district court of Routt county other than at the county seat, would be not only to reverse the previous rulings of this court, but to uphold a palpable infraction of the constitution. We have never gone to the extent of holding, as some courts have, that the exercise by the legislature of authority to pass a special law precluded the courts from reviewing such action, and, even if found to be clearly in conflict with constitutional provisions, without jurisdiction to declare it void. The presumptions are always in favor of the validity of such acts, and questions of doubt are to be resolved in favor of the legitimate exercise of the power to enact them.

That the permanent location for the holding of the district courts in the counties of the state can be fixed by general laws has been demonstrated by the acts of the legislature itself, during a long term of years, which acts overcome all presumptions that a departure is necessary in the case of a single county. No such provision as that complained of exists as to any other county in the state, and, it being the duty of the county commissioners to provide accommodations for the holding of courts, it is not only unnecessary in this case for the legislature to make such provision, but would seem to be an interference with the functions of the county authorities.

There are other considerations which bear with some

force against the constitutionality of this portion of the act in question. Among the enumerated cases of section 25 of the constitution, concerning which special legislation is in express terms prohibited, is the following: "Regulating county or township affairs." One of the most important constitutional guaranties secured to each and all counties of the state is freedom from the evils of special legislation, whereby county affairs and county government are likely to be continually disturbed by useless and unwholesome enactments. It is well known that bills for legislation of this character are often introduced to satisfy the caprice or selfish interests of individuals, and when they pass, it is by reason of a lack of interest of members whose constituents are not affected by the proposed measures. Perhaps the strongest illustration of the value of this guaranty that could be given would be the different effects produced on county government by the observance of the general laws of the state, on the one hand, and of the same as qualified by the special provision under consideration, on the other hand.

At the time of the approval of the special enactment concerning Routt county the statute required each organized county to provide, at its own expense, a suitable court-house and a sufficient jail, and other necessary county buildings, and to keep them in repair. Gen. St. p. 255, § 524. The people of a county were permitted to locate permanently their county seat by a majority vote of its legal voters. Id. p. 291, § 683. By a previous act of the same session it had been provided that the sheriff, county clerk, county treasurer and clerks of the district and county courts were required to keep their respective offices at the county seat, and in the offices provided by the county. If offices had not been provided, then it became the duty of the county commissioners to provide offices for them, and said officers were required to keep their respective offices open during the usual business

hours of each day, Sundays and legal holidays excepted, and all books and papers required to be in their offices were to be open to the examination of any person. Laws 1885, p. 157. The district courts of the several counties comprising the seven judicial districts of the state were required to be held at the county seats of the several counties. Gen. St. p. 389, § 1062. Even the county commissioners were required to hold their meetings at the county seats. Gen. St. p. 256, § 531.

Here was a system applicable to every county in the state, arranged with reference to convenience and economy. The business of each county — judicial, ministerial and executive — was to be transacted at the court-houses and offices provided by the county authorities at the county seats. Note how the symmetry of the system is marred, and the *regulating* of county affairs is interfered with, by the special provision of April 8, 1885. The records and files of the district clerk's office must be removed to the place named in the special act for the holding of the district court, whenever a term of court is to be held. The clerk must close his office in order to attend the sittings of the court, or he must employ a deputy. Prisoners in jail must be transferred to such place for trial. A place must be provided for the sessions of the court. A secure place must be provided for the temporary confinement of the prisoners. Now, each one of the aforesaid acts involves a wholly unnecessary and useless expense to the county. If the county has observed the law, it has a court-house, a jail, and public offices at the county seat, where the court is required by the general law to be held. If not, temporary buildings must be provided there by the county commissioners. It would seem, therefore, that the special provision for holding the sessions of the court at a place not the county seat has the effect to "regulate county affairs" by a special act, and, having such effect, that it is expressly inhibited by the constitution. It is cer-

tainly a gross interference with the lawful regulation of county affairs.

We are aware that a different conclusion was reached in the case of *Whallon v. Circuit Judge*, 51 Mich. 503, but the facts, the laws of that state, and the constitutional provision involved, were so dissimilar to the corresponding points in the present controversy as to distinguish the cases. A portion only of the terms of the circuit court were required to be held in a place not the county seat, and the objection to the change of location as to them was based upon the following constitutional provision, being section 8 of article X of the Michigan constitution, viz.: "No county seat once established shall be removed until the place to which it is proposed to be removed shall be designated by two-thirds of the board of supervisors of the county, and a majority of the electors voting thereon shall have voted in favor of the proposed location, in such manner as shall be prescribed by law." The court held, upon a review of the legislation of the state, that such courts were not required, in all cases, to be held at the "county seats," but may be held at the "seat of justice;" that these terms are not synonymous, and may refer to different locations; also that there was no constitutional provision requiring the circuit courts to be held at the county seats, and that no general law had ever been enacted by the legislature containing such a requirement. The decision, therefore, cannot be regarded as a precedent upon the question here involved.

Having decided that that portion of the act of April 8, 1885, is unconstitutional and void which requires all sittings of the district court of Routt county to be held at a place not the county seat, the remaining question to be determined is, how does this adjudication affect the claim of the plaintiff? The judge of the first judicial district attempted, in compliance with the act of the legislature, to hold a term of court at the town of Yampa, in August, 1885. The plaintiff was summoned to attend such term

as a petit juror, and did attend the same, serving in the capacity mentioned for the period of five days, for which he received from the clerk a certificate, showing that there was due him for said service the sum of \$12.50. He presented this certificate to the board of county commissioners for allowance and payment, which they refused, on the ground that the law under which the court was held was unconstitutional, and the proceedings a nullity. We are of opinion that the action of the commissioners must be sustained. A court held either at a time or place not authorized by law is held to be no court; from which it would follow that its proceedings are of no legal force whatever.

Mr. Cooley lays down the rule thus: "When a statute is adjudged to be unconstitutional, it is as if it never had been. Rights cannot be built up under it. Contracts which depend upon it for their consideration are void. It constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void *in toto* is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force." Cooley, Const. Lim. p. 188; *Hollingsworth v. Barbour*, 4 Pet. 466. When a legislative act, under and by virtue of which the functions of a court are assumed and exercised, is adjudged unconstitutional and void, the assumed jurisdiction of the court falls with the act, and with it the proceedings of the court as well. Freem. Judgm. § 120; *Reed v. Wright*, 2 G. Greene, 15. As laid down in *Voorhees v. Bank*, 10 Pet. 477: "If there is a total want of jurisdiction, the proceedings are void, and a mere nullity, and confer no right, and afford no justification; and may be rejected when collaterally drawn in question."

Our conclusion upon the whole case is that the act in question is valid to the extent of providing an annual

term of the district court for Routt county, and the *time* for holding the same. The general law provides the place where said term shall be held, viz., at the county seat, and that the act is void in so far as it fixes a different place for holding the court.

It follows from the views expressed in this opinion that the plaintiff cannot recover. Judgment will therefore be entered for the defendant, for costs.

Judgment for defendant.

HELM, J., concurs in the conclusion.

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17 321

BOARD OF COUNTY COMMISSIONERS OF GRAND COUNTY
v. BOARD OF COUNTY COMMISSIONERS OF LARIMER
COUNTY.

Monuments control courses, and a specific course will control a general course. The legislature, in defining a boundary line, having given a starting point upon the Continental divide, and thence to proceed "northerly on said summit," *held*, that by the words "thence in a northerly direction on said summit" the legislature intended a continuous line, following the course of the summit of the range upon which they had established a starting point, and that it was a call for a specific course.

Error to District Court of Summit County.

BILL for injunction. Judgment for defendants. Writ of error to the supreme court.

* * * * *

"An act to define county boundaries, and to locate county seats, in Colorado territory.

"Be it enacted by the council and house of representatives of Colorado territory:

"Sec. 1. That the following shall be the boundaries of the respective counties, and the county seats therein, as named, with the description thereof:

"Sec. 2. Costilla county: Commencing at a point on the southern boundary of the territory where the range line between ranges sixty-nine (69) and seventy (70) intersects said boundary; thence north, along said range line, to the point where said line intersects the Sangre de Christo pass or road; thence, in a southwesterly direction, on said road, to the summit of the Snowy range; thence, in a northwesterly direction, on said summit, to the range dividing the waters of the Eagle Tail river and the Rio Grande del Norte; thence, in a southwesterly direction, with said range, to a point opposite the headwaters of the Rio Grande del Norte; thence, in a westerly direction, along the Sierra de la Plata, to the western boundary of the territory; thence south, to the southwest corner of the territory; thence east, to the place of beginning."

* * * * *

"Sec. 10. Fremont county: Commencing where the line between ranges sixty-eight (68) and sixty-nine (69) intersect the third correction line south; thence due west on said correction line to where said line, if continued, would intersect the Arkansas river; thence due south, to the summit of the Snowy range; thence along said range, to the Sangre de Christo pass; thence along said road or pass, to where said road intersects the line between ranges sixty-nine (69) and seventy (70); thence north, to a point where said range line intersects township line between townships twenty-two (22) and twenty-three (23) south; thence east three (3) miles to the center of range sixty-nine; thence north, to a point where said line intersects the township line between townships seventeen (17) and eighteen (18) south; thence east three (3) miles, on said line, to where said line intersects the line between ranges sixty-eight (68) and sixty-nine (69); thence north twelve (12) miles, to the place of beginning."

* * * * *

"Sec. 20. Larimer county: Commencing at a point where the township line between townships four (4) and five (5) north intersect the range line between ranges sixty-seven (67) and sixty-eight (68), running west six miles; thence south six miles, to the township line between townships three (3) and four (4) north; thence west along the northern boundary of Boulder county, to the summit of the Snowy range; thence in a northerly direction, on said summit, to the northern boundary of the territory; thence east on said northern boundary to the range line between ranges sixty-seven (67) and sixty-eight (68); thence south to the place of beginning."

* * * * *

"Sec. 22. Boulder county: Commencing at a point where the township line between townships one (1) and two (2) south intersect the range line between ranges sixty-eight (68) and sixty-nine (69); thence west on said township line to the east line of Gilpin county; thence along said line to the South Boulder creek; thence west along the northern boundary of Gilpin county, to the summit of the Snowy range; thence along the summit of first range, to a point at or near the summit of Long's peak; thence east on said township line, to the range line between ranges sixty-eight (68) and sixty-nine (69); thence south to the place of beginning."

* * * * *

"Sec. 26. Clear Creek county: Commencing at the junction of the North and South Clear creeks; thence up the dividing ridge between said streams, to the summit of the Snowy range; thence along said summit, to the point where the correction line south, if continued, would intersect said summit; thence east on said correction line, to the western boundary of the county of Jefferson; thence north to the place of beginning."

* * * * *

"Sec. 28. Gilpin county: Commencing at the junction of the North and South Clear creeks; thence north,

to the South Boulder creek; thence up the channel of said creek, to a point where Beaver creek unites with Boulder creek; thence in a line due west, to the summit of the Snowy range; thence south on said summit, to the northern boundary of Clear Creek county; thence, in an easterly direction, with said northern boundary, to the place of beginning."

* * * * *

"Sec. 30. Park county: Commencing at a point where the second correction line south intersects the Platte river; thence south, to the third correction line south; thence west, to the summit of the Snowy range, east of the Arkansas river; thence in a northerly direction, along the divide between the Arkansas and Platte rivers, and around the head-waters of the Platte river, and its branches; thence easterly, along the Snowy range, dividing the waters of the Platte from the waters of the Blue, to the point of intersection with the first correction line south; thence east on said correction line, to the western boundary of Jefferson county; thence south on said boundary, to the Platte river; thence up the center of said river, to the place of beginning."

* * * * *

"Sec. 32. Lake county: Commencing at a point on the summit of the Snowy range, at the northwest corner of the county of Park, and running due west, to the western boundary of the territory; thence south on said boundary, to the summit of the Sierra la Plata, or the northwest corner of Guadalupe county; thence easterly along the northern boundary of said county, to the northwest corner of Costilla county; thence northerly along the summit of the Snowy range, or boundary of San Miguel de la Costilla county, to the northwest corner of the county of Fremont; thence north, on the western boundary of said county, to the northwest corner of said county; thence east, on the northern boundary of said county, to the summit of the range dividing the

waters of the Platte and Arkansas rivers; thence northerly on said summit, to the place of beginning."

* * * * * * * * * *

"Sec. 34. Summit county: All that portion of the territory bounded on the south by the county of Lake, and on the east by the summit of the Snowy range, and on the north and west by the territorial boundary."

Messrs. W. T. HUGHES and HUGH BUTLER, for plaintiffs in error.

Messrs. HAYNES, DUNNING and ANNIS and BALLARD and ROBINSON, for defendants in error.

ELBERT, J. The great range known as the "Sierra Madre" or "Continental Divide," to which frequent reference must be made in this case, traverses the state from south to north. While its trend is irregular, sweeping far to the west, and then to the east, of a direct northerly line, it both enters and leaves the state substantially at the one hundred and seventh meridian. It constitutes the water-shed between the waters of the Pacific and the waters of the Atlantic flowing into the Gulf. Southward it throws off several spur ranges to the southeast, which mask it from the plains. Northward for a long distance it is the great range fronting the plains. Near the northern extremity of this front stands Long's peak, rising to an altitude of fourteen thousand two hundred and seventy-one feet, and overlooking the northern boundary of the state, at a distance of from fifty to sixty miles. From this peak, for a distance of about eighteen miles (according to the Hayden surveys and maps), this great chain trends in a northwesterly direction to Richthofen peak, where it bifurcates, throwing off a spur to the north and northwest, known as the "Medicine Bow Range." The main range turns westward for a distance of forty or forty-five miles, when it again resumes and maintains its general northerly direction to the northern

boundary of the state. Within the embrace of these two ranges lies what is known as the North Park, walled in by the Medicine Bow range upon the east, by the main range upon the south and west, and by a series of secondary mountains and hills upon the north. It is elliptical in form and a principality in extent, rich in soil, luxuriant in pasturage, and supreme in the grace and beauty of its valleys and the grandeur of its mountain architecture. It holds within its ample compass the abounding springs which feed the head-waters of the North Platte, which here has its rise, and which, gathering together its mountain affluents, forces a passage through the northern rim of the park, on its way to the Gulf. It is contended by the plaintiffs that this park lies within the boundaries of the county of Grand; by the defendants, within the boundaries of the county of Larimer.

The county of Grand was formed from a portion of the territory of the county of Summit, which, with Larimer and fifteen other counties, constituted the seventeen counties into which the territory was originally divided by the first territorial legislature. This division was made by an act approved November 1, 1861, entitled "An act to define county boundaries and to locate county seats in Colorado territory." The question is whether, by the terms of this act, the North Park is within the boundaries of the county of Larimer or within the original boundaries of the county of Summit. If the latter, it follows that it is now within the boundaries of the county of Grand.

By reference to the act, it will be noticed that the section establishing the boundaries of Larimer county fixes the southwestern corner on the summit of the Snowy range. The language is: "Thence west, along the northern boundary of Boulder county, to the summit of the Snowy range." This is also the northwestern corner of Boulder county, "at or near the summit of Long's peak," as will be seen by reference to section 22 of the act. The

sentence describing the western boundary of Larimer county is as follows: "Thence [from Long's peak], in a northerly direction, on said summit, to the northern boundary of the territory."

The plaintiffs contend that this fixes the Medicine Bow range, before described, as the western boundary of Larimer county; that, although a spur, it has all the characteristics of a snowy range, and it is the only range northerly. On the other hand, it is contended by the defendants that, in using the term "snowy range," the legislature intended the Great range or Continental divide, and that, although it has, for quite a distance, as we have seen, a course due westward, it is the monument indicated and must control the course.

The legislative intention in the use of the term "snowy range," in defining the boundaries of the county of Larimer, is the leading question, and to it the argument of counsel, and the testimony of witnesses, are largely addressed. The same term, employed in the section describing the boundaries of the county of Summit, is also to be interpreted, as the eastern and western boundaries of these two counties are supposed to coincide, and the term "snowy range" in both sections to refer to the same boundary line. The argument proceeds upon this hypothesis.

The witnesses are all, or nearly all, early settlers, acquainted with the early history of the country, and many of them prominently identified with it. Their testimony is conflicting. By some it is said that the term "snowy range" was applied to any snow-carrying range, with peaks elevated above the snow-line; by others, that it was a term exclusively applied to the range dividing the Atlantic and Pacific waters. We think the preponderance of testimony supports the latter view. It will be seen, however, by reference to the act of the legislature, that the term is applied not only to the Continental divide, but to the great mountain spurs known as the

Mosquito and Sangre de Christo ranges. If we lay aside the conflicting testimony upon this point, and address ourselves to a consideration of the act itself,—to a comparison of the different sections in which the disputed term occurs,—we think there is sufficient to be found to determine this controversy with reasonable certainty and by established rules.

The term occurs in nine different sections. In the sections establishing the counties of Costilla and Fremont, the term "snowy range" is applied to the Sangre de Christo spur, but the range meant is clearly indicated by the use of the words "Sangre de Christo" in each case. In the section establishing the county of Park, the term is applied to the Mosquito spur, but it is designated as "the snowy range east of the Arkansas river." In section 32, defining the boundary of Lake county, the term "snowy range" is applied, without further description, to the Continental divide. The Mosquito range, to which the term "snowy range" is applied in section 30, is described in this section as "the range dividing the waters of the Platte and Arkansas rivers." A noticeable fact is that to the extent that the great western spur (the Sierra la Plata range) is made the southern boundary of this county, it is described by its local name, and that as soon as the Continental divide is reached, the term "snowy range" is again employed as a descriptive term. In the sections fixing the boundaries of Boulder, Clear Creek and Gilpin, the western boundaries are fixed "on the summit of the Snowy range," and here the Continental divide is meant, without dispute. The Continental divide constitutes, in part, the western boundary of the county of Park, at the north, where it is described as "the Snowy range, dividing the waters of the Platte from the waters of the Blue."

The legislature having divided substantially all the territory east of the Continental divide into fifteen counties, addressed themselves to a division of the broad

domain lying west of it, but little known, and with but few settlements. They divided it (excepting a small portion already embraced within the boundaries of the county of Guadaloupe) (Conejos) into the two great counties of Lake and Summit, the former upon the south, the latter upon the north. They are the last two counties established by the act, and in the order named. We have already seen that where the eastern boundary of the county of Lake rests upon the summit of the Continental divide it is designated by the term "snowy range," without more; that where it rests upon the summit of the Mosquito spur, it is designated as "the range dividing the waters of the Platte and Arkansas rivers;" and it is to be further noted that its eastern boundary is made to conform to the western boundaries of Costilla, Fremont and Park, already established and confronting it on the east.

We have thus noticed seven out of the nine sections of the act in which the term "snowy range" occurs. The other two sections in which it occurs are the sections concerning the counties of Larimer and Summit, which we are called upon to construe. If we summarize the result of this examination, we find (1) that in every instance (Boulder, Gilpin, Clear Creek, and Lake) save one (Park), where the term "snowy range" is applied to the Continental divide, it is used singly and in itself as being descriptive of what was intended; (2) that in every instance (Costilla, Fremont and Park), where the term is applied to a spur, the spur meant is in some other way indicated; (3) that in every instance (Costilla, Lake and Park), where the boundary passes from one range to another, the fact is clearly stated; (4) that in the only instance (Lake) of a county lying west of the Continental divide, its eastern boundary is made to conform to the western boundaries of the counties already established on the east of the divide, and that this eastern boundary rests in part upon the Continental divide, and in part

upon the Mosquito spur, and *that that fact is clearly stated.*

Construing sections 20 and 34, establishing the boundaries of the counties of Larimer and Summit, *in pari materia*, and arriving at the intention of the legislature in using the term "snowy range" in these two sections by the manner of its use in the other seven sections, we must say: (1) That had they intended a spur, as in whole or in part constituting a boundary, they would have indicated the spur meant. Such is the rule, without exception, in the other sections. (2) That had they intended that the boundary in its course should leave the summit of one range, and pass to another, they would have so directed in plain terms; for such is also the rule, without exception, in the other sections. (3) If they had already fixed the western boundary of the county of Larimer in part upon the Continental divide, and in part upon the Medicine Bow range, that in fixing the eastern boundary of the county of Summit so as to conform to it they would have clearly indicated, as in the case of the county of Lake, that it rested in part upon the Continental divide and in part upon a spur.

In this connection it must be remembered that the evidence shows that prior to the first session of the territorial legislature the Medicine Bow range was known by that name and as a "spur."

Construction *in pari materia* leads, thus, to but one conclusion, namely, that the legislature, by the term "snowy range," both in the section establishing the boundaries of the county of Larimer and the section establishing the boundaries of the county of Summit, intended to indicate and establish the Continental divide as the eastern boundary of the one and the western boundary of the other. If we construe the two sections independently, we are led to the same conclusion. Section 34 of the act describes Summit county as being "all that portion of the territory bounded on the south by the

county of Lake, *on the east by the summit of the Snowy range*, and on the north and west by the territorial boundary." This eastern boundary, on a straight line from north to south, has a length, in round numbers, of about one hundred and ten miles. Following the irregular course of the summit of the Continental divide, it is, in round numbers, about two hundred and twenty miles. From the southeast corner of the county to Long's peak, following the course of the range, is about a hundred miles. From the southeast corner to Richthofen peak the Continental divide is necessarily the range intended, as no other range exists. After following this summit, in all its various winding, for a distance of over a hundred miles, by what authority are we to leave it and follow the summit of Medicine Bow spur, in the absence of any direction in the act to that end? The eastern boundary in this section is designated as the summit of the Snowy range. But one range was intended. The Continental divide answers the call for the entire distance. There is no requirement of a course northerly, as in the section establishing the county of Larimer. It is the *only* range which answers the call for the entire distance. If we attempt to trace the boundary from the north to the south, it is the only monument to be found upon the northern boundary answering the call. If we say that the Medicine Bow spur was intended, a party of surveyors must be detailed to fix an artificial monument upon the northern boundary, from which to run an air line southward to the summit of Medicine Bow spur. Every rule of construction, therefore, requires us to say that the legislature, in describing the eastern boundary of the county of Summit as the summit of the Snowy range, intended the Continental divide. It is unreasonable to suppose that the legislature did not intend to make this eastern boundary conform to the western boundary of Larimer county. If this be conceded, the term "snowy range" must be taken to mean the same boundary in both sections.

It being clear what range was intended in fixing the eastern boundary of Summit county, it becomes equally clear, by reference, what range was meant in fixing the western boundary of Larimer. *Certum est quod certum reddi potest* is both a rule of law and of logic. And here I wish to repeat that if the legislature had already fixed the western boundary of the county of Larimer in part upon the Medicine Bow spur, it is remarkable that they did not make the eastern boundary of Summit county conform to it by mention of the spur, as in the case of Lake county, when not to do so was to leave the North Park outside of any organized county.

Let us now turn our attention to a construction of the section establishing the boundary of the county of Larimer. As we have seen, it establishes the southwest corner of the county upon the summit of the Snowy range, coincident with the northwest corner of Boulder county, "at or near the summit of Long's peak." Without dispute, at this point the range is the Continental divide. By the language of the section its boundary is: "Thence, in a northerly direction, on said summit, to the northern boundary of the territory." We follow it for eighteen miles, to Richthofen peak, where it throws off the Medicine Bow spur. The legislature having given us a starting point upon the Continental divide, and directed us to proceed "northerly" "on said summit," again it may be asked, by what authority, after following it for eighteen miles, are we to leave it?

The direction is not "northerly" alone, but "northerly" "on said summit." True, we lose the course "northerly" for a distance of about forty-five miles, but monuments control courses, and, if the average course be taken from the point of beginning to the point of ending, the course is "northerly." The Medicine Bow range undoubtedly satisfies the course northerly indicated more fully than the main range, but it does not satisfy, to the same extent, the designation "snowy range," nor does it

satisfy at all the course indicated by the words "on said summit." For a distance of twenty-five miles or more from the point of departure (according to the testimony) it is a bold, well-defined range, with more or less snow upon its summits. But long before it reaches the northern boundary of the state it drops off into secondary mountains and foot-hills, and finally subsides into plains. As a boundary line, it offers the summit called for by the section only for a part of the distance; for the remaining distance resort must be had to an air line and to an artificial monument upon the northern boundary. Construing the section by itself, there is no authority for saying that the western boundary of Larimer county is to be found on the summit of any other range than the one thus clearly and specifically indicated and determined by the starting point fixed at its southwest corner, "at or near the summit of Long's peak."

Monuments control courses, and a specific course will control a general course. By the words, "thence in a northerly direction on said summit," the legislature intended a continuous line following the course of the summit of the range upon which they had established the starting point. "Thence in a northerly direction" is a general call for course. "Thence in a northerly direction on said summit" is a call for a specific course. Monument and course are, in this case, associated and identical at every step of the way, and while the general course is northerly, the specific course is "northerly on said summit." Possibly the legislature may have intended the Medicine Bow range, as it fronts the plains from its point of departure. Possibly they may have thought it the Continental divide. But all this rests in conjecture, and not upon the terms of the act.

Much has been said in this discussion respecting the maps published, from time to time, showing the western boundary line of Larimer county to be the Medicine Bow range. None of these maps appear to have been pub-

lished by authority. They appear to be the work of private individuals, and are valuable only as showing their construction of the act fixing the boundaries of the different counties of the state. We do not notice them further, as none of them are in evidence. The Hayden maps and surveys were published by authority of congress. We have noticed them judicially in several instances. While it is true that it appears from the testimony that the Medicine Bow range has been recognized as the western boundary of the county of Larimer in one or two instances by the executive of the state, and, in other instances, by the county officials of Grand county, it is our duty to construe the act for ourselves, and, if its terms be reasonably plain, a different construction given it by officials cannot be allowed either place or weight. Much stress is laid upon the fact that, for a long period of time, Larimer county laid no claim to the territory in dispute. But, in this connection, it must be remembered that the North Park is geographically isolated, and, for a long time after the passage of the act organizing the counties of the territory, was uninhabited. According to the testimony, it was a hunting ground for the Indians, to which it was dangerous for the white man to resort. Whether it was in this or that county was a neglected question, which no one was especially interested in raising. Occupancy and settlement brought it into notice, and gave it some civil and political importance. The contention for its municipal control followed close in the footsteps of the first settlers. We find nothing in this point justifying a different conclusion from the one stated.

The judgment of the court below is affirmed.

Affirmed.

BRIGGS v. BRUCE.

Leave to amend a pleading is of no effect unless complied with. Judgment cannot be rendered for items not set forth in the pleadings.

Appeal from County Court of Weld County.

THIS was a proceeding to enforce a mechanic's lien upon certain premises situate near the town of Erie, in Weld county. The plaintiff, John Bruce, in his complaint alleges that he entered into a contract with the defendant, Henry Briggs, on or about the 1st day of December, 1881, to do certain work by the day, and as a mechanic, upon a building owned by the defendant, for the sum of \$75; that he began the work about December 1, and finished about December 20, 1881; and that there remains unpaid and due on said contract the sum of \$64.25. The complaint also alleges that plaintiff made and filed a claim for a lien against the premises as provided by law. The prayer is for a lien against the property for the said sum of \$64.25, for interest thereon from December 20, 1881, and for costs, including the sum of \$4.20, the expense of making and recording the lien claim; also that execution issue against the premises. The defendant's answer admits the contract as stated, and that, in addition to the \$75, the plaintiff performed other work of the value of \$1, making \$76 in the aggregate. Defendant denies that there remains due and owing plaintiff the sum of \$64.25, but avers that the balance then remaining due and unpaid was the sum of \$26 only; specifically averring payment of all indebtedness exceeding that sum before suit brought. In his third defense he alleges payment to the plaintiff of the sum of \$50 on account of said work before the commencement of the action, leaving the sum of \$26, and no more, due to plaintiff. No replication was filed to this answer, and upon the close of the plaintiff's testi-

mony the defendant moved that the action be dismissed, save as to the sum of \$26, for failure of the plaintiff to reply to the second and third defenses set up in the answer. The court overruled the motion, and permitted the plaintiff to amend his complaint so as to conform to his proof. The defendant then introduced his testimony, and the court, upon consideration of the case, found that defendant was indebted to the plaintiff in the sum of \$41.70, and rendered judgment for said sum, and costs of suit; ordering that the judgment be made a lien against said property. Upon the trial the plaintiff claimed that he had performed extra work upon the building, the same consisting of fourteen days' labor, at the sum of \$3.50 per day, and admitted payment by the defendant of the sum of \$50.

Mr. W. B. MILLS, for appellant.

Messrs. NORTH and STIDGER, for appellees.

BECK, C. J. The first error assigned is the refusal of the court to dismiss the action as to all claims, except the sum of \$26, on account of the failure of the plaintiff to reply to the second and third defenses. The effect of plaintiff's failure to reply to the answer was to admit as true the averment of the payment by the defendant of the sum of \$50 on account of the indebtedness mentioned in the complaint. Sections 75 and 76, Civil Code; Bliss, Code Pl. § 396. Upon the pleadings as they stood at the time the motion to dismiss was interposed, there was due the plaintiff the sum of \$26, together with interest thereon from December 20, 1881. The motion should have been allowed and judgment entered for the said sum, together with interest and costs, including the sum paid for making and recording the lien claim.

The payment of the \$50 was admitted by the plaintiff in his testimony. The error of the court, therefore, was in allowing any part of the claim for services not sued

for, viz., the claim for extra work. That a portion of that claim was allowed is evident from the amount of the judgment. No such claim was mentioned in the original complaint, and the amendment allowed at the trial either did not embrace the same or the amendment was not made, as no claim for extra work appears in the transcript of the complaint before us. Leave to amend a pleading is of no effect unless the order is complied with. Haynes, New Trials, p. 169, § 57; *Kimball v. Gearhart*, 12 Cal. 46.

The amendment which was permitted to be made is set out in the transcript at folio 24 and is as follows: "The court ordered that plaintiff have leave to amend said complaint by interlining in the original complaint an averment that there was a cause of action on specific contract for work on a building for the sum of \$75." Following this order the record states: "And the defendant then and there stipulated that he would waive all exceptions to the form of the two counts in the complaint as amended." Leaving out of view the question whether an amendment granted upon the trial, embracing a claim for extra work, would introduce a new cause of action, the record fails to show that any such amendment was either prayed for or ordered to be made. The complaint makes no mention of extra work and contains no charge for any work other than that contracted to be performed for the sum of \$75. If the plaintiff's theory be that the \$50 paid by the defendant was in settlement of the extra labor, he is estopped from setting up such application of the payment by his failure to file a replication to defendant's answer.

As the judgment proper exceeds the amount due on the contract, allowing interest as claimed, it is hereby reversed and the cause remanded, with directions to the court below to enter judgment in conformity with the views expressed in this opinion. Judgment reversed, with costs.

Reversed.

OCTOBER TERM, 1886.

9 255
6a 366TABOR, IMPLEADED, ETC., V. ARMSTRONG, AND ARMSTRONG
V. TABOR.

1. The expression "due or to become due under the contract," used in section 1657 of the General Laws (1877), entitles the subcontractor to be paid out of moneys that may become due the contractor for labor or materials furnished by other persons subsequent to the subcontractor's lien notice, but under the same principal contract.
2. The subcontractor is not entitled to a lien for expense incurred through idleness enforced by the default or negligence of the principal contractor.

*Appeal from, and writ of error to, District Court of
Arapahoe County.*

ARMSTRONG, as subcontractor, brought a mechanic's lien suit against Cook as original contractor, and also against Tabor as owner of the property upon which the labor was performed and materials furnished. Armstrong claimed certain damages for enforced idleness and extra expense in consequence; also for work on the building caused by the delay, default and negligence of Cook, as well as compensation for the labor performed in the immediate work of placing the stone in position. Cook made default, and a personal judgment was entered against him; it being expressly stipulated that such judgment should not in any manner prejudice or affect the rights of either Tabor or Armstrong in the action. Upon trial a decree was entered against Tabor, allowing the lien for the sum of \$922.68; but the damages claimed on account of the so-called extra work and expenses above mentioned were disallowed. From the decree and judgment Tabor took his appeal to the supreme court. To review the same, because of the rejection of his claims for the consequential damages aforesaid, Armstrong sued out a writ of error.

By stipulation both causes in the supreme court were submitted together, and were to be taken as though Armstrong had filed cross-errors in the Tabor appeal. The objections raised in both are therefore considered and determined by one opinion. The complaint, among other things, alleges "that the sum [an amount sufficient to cover plaintiff's entire demand] became due from defendant Tabor to defendant Cook for work and materials furnished and performed on said building on and after April 15, A. D. 1880;" said April 15th being the date of Armstrong's notice to Tabor of his intention to claim a subcontractor's lien, Armstrong himself doing no work after that date.

Section 1657 of the General Laws, being section 6 of the mechanic's lien law, in force at the time the transactions out of which the original action arose took place, reads as follows: "Every subcontractor, journeyman, laborer or other person performing work or labor, or furnishing materials, shall, under the provisions of this act, have a valid lien upon the building or superstructure or other property upon which a lien may be claimed, as hereinbefore provided, and upon which such work or labor was performed or for which such materials were furnished; and if any money be due or is to become due under the contract, from the owner or owners to such contractor, upon being served with a copy of the statement as provided in section two (2) of this act, by a subcontractor, journeyman, or laborer, as aforesaid, [the] owner or owners may withhold out of any moneys due or to become due under the contract a sufficient amount to satisfy the lien claimed by such subcontractor, journeyman or laborer, or other person performing work or labor or furnishing materials, until the validity thereof be established by proper legal proceedings, if the same be contested; and if so established, the amount thereof shall be a valid set-off to that extent in favor of such owner or owners, and against the contractor. And, after such copy of the statement shall

have been properly served upon such owner or owners in case of a failure to comply with the provisions of this section, then each subcontractor, journeyman, or laborer, or party furnishing materials, may sue and recover from such owner or owners the amount of any damages he may have sustained by reason of such failure. * * *

Messrs. SULLIVAN and MAY and J. M. ELLIS, for plaintiff in error and appellee.

Mr. L. C. ROCKWELL, for appellant and defendant in error.

HELM, J. Two questions are presented by the records and arguments in these cases: *First*, is the expression "due or to become due under the contract," used in section 1657 of the General Laws, confined to moneys due or to become due for labor or materials furnished previous to the service of the statutory notice by the subcontractor upon the owner, or does the subcontractor's lien notice entitle him to be paid out of moneys that may become due the contractor for labor performed or materials furnished by other employees or materialmen subsequent to the date of such notice, but under the same principal contract? And, *second*, is the subcontractor entitled to his lien upon the premises and action against the owner for damages and expense incurred through idleness enforced, or on account of work made necessary by the default or negligence of the principal contractor? These questions will be answered in the order of statement.

The statute treats the original contract as an entirety. It gives the subcontractor or laborer a lien if money is due and unpaid to the contractor at the time of serving his notice upon the owner, or if thereafter money becomes due under the contract. Having received the requisite notice, if the owner fails to withhold money thereafter becoming due under the principal contract,

his statutory liability to the subcontractor or laborer attaches. Upon this liability there is no language in the law that expressly imposes a limitation. The statute itself does not say that the money spoken of as "to become due" must be payments that have not yet matured for the work previously performed or materials previously furnished by the party claiming a lien. We cannot conclude that it was the intention of the legislature to thus limit the language used. That body would hardly have left so important a qualification wholly unexpressed. For us to recognize such a limitation would be to interpolate into the statute something we cannot, by any fair intendment, find therein.

It is urged that this view of the law might produce gross injustice; that it allows one man the benefit of another's labor or property. The evident answer to this objection is that the entire completed building is necessary to the adequate protection, under the law, of all connected with its erection. The various subcontractors, material-men and laborers all act under the same general contract, though not privies thereto,—the only contract to which the owner is a party. They each and all contribute to the structure, which is the common product of their materials and labor. The lumber furnished by one person cannot be segregated from that furnished by another; nor can the interest of a material-man be protected without the work of the laborer; while, of course, the combined labor of all the workmen furnishes the foundation for each individual workman's security. Thus the subcontractors, laborers and material-men who contribute to build one part of the structure would be receiving the benefit of each other's contributions, even if, according to counsel's contention, the materials and labor furnished by those completing another part could be and were excluded from the statutory lien and right of action. The truth is that each subcontractor, laborer and material-man who invokes the statute must of necessity

reap a benefit from the aid given the enterprise by other subcontractors, material-men and laborers. A moment's careful reflection will show how futile would be a legislative attempt to confine each man's lien to the result of his own labor, or to his own materials, or to the particular part of the structure to the erection of which his labor or materials contributed, and at the same time accomplish the beneficent purposes for which the law is framed.

We now turn to the second question above stated. As already suggested, there was no privity of contract between Armstrong and Tabor. Whatever right Armstrong may have against Tabor or his property must be derived solely from the statute; but the statute contains a provision expressly limiting the liability of the owner and his property to those cases where the lien is claimed for labor actually performed upon the "building and superstructure," and materials actually furnished therefor. The language used is so plain that it needs no judicial construction. But provisions in other states, similar in this respect, have been passed upon; and, so far as we are aware, it has been universally held that the demand "must be due as a consequence of actual performance." *Minor v. Hoyt*, 4 Hill, 193; *Houghton v. Blake*, 5 Cal. 240; *Taggard v. Buckmore*, 42 Me. 77. See, also, *Barnard v. McKenzie*, 4 Colo. 251. In view of this conclusion we cannot indorse the proposition advanced, that the amount for which the subcontractor is entitled to his statutory lien and action is always to be measured by the extent of his valid claim against the principal contractor. Where, by the default or neglect of the principal contractor, the subcontractor is obliged to remain idle, and suffers loss in consequence, he may undoubtedly recover of the contractor; but such damages could constitute no valid claim, under the statute, against the owner. Therefore, Tabor had a right to inquire into the validity of Armstrong's demand, and the evidence concerning the latter's alleged claims of \$500 and \$75, re-

spectively, was properly excluded. The \$50 item is abandoned by counsel in argument, and hence we do not consider it.

There remains but a single question, viz., did the court err in rejecting evidence of the \$260 demand? This amount was claimed by Armstrong for labor which he was obliged to perform in consequence of Cook's failure to distribute the cut stone in the most convenient order and places about the building. The labor of removing cut stone furnished for the second story in order to reach that required for the first, and the work of transferring such stone from the Larimer street front to the front on Sixteenth street, where it belonged, became necessary in the erection of the structure. It cannot properly be termed extra work, wholly outside of the principal contract. It had to be done before Armstrong could go on with his work of setting the stone into the respective walls. Had Cook himself employed some day-laborers to do this work, they would, in our judgment, have been as much entitled to a lien as is the man who does any other work preliminary or incidental but essential to and directly connected with the actual laying of the foundation walls, or erection of the superstructure. And we can discover no good reason for applying a different rule to Armstrong merely because he happens to be a subcontractor instead of laborer. If, therefore, Armstrong could have succeeded, through the introduction of proper evidence, in establishing a valid claim against Cook for the so-called extra work now under consideration, we are of the opinion that he was entitled to have it included in his recovery against Tabor. For error in the view taken upon this subject, and consequent rulings by the district court, its judgment must be reversed.

None of the foregoing conclusions conflict with anything decided in *Jensen v. Brown*, 2 Colo. 694, or *McIntyre v. Barnes*, 4 Colo. 205, cited by counsel.

Reversed.

FARRAND V. BESHOAR.

1. At common law a married woman, though living apart from her husband, could not make a binding contract except for necessities or for the benefit of her separate estate; this rule was not changed by statute until 1872.
2. In the absence of fraud, an absolute deed will not be construed as creating a constructive or resulting trust.
3. In equity, before the statutes of 1872 and 1874, the written contract of a married woman, for the benefit of other persons, was not a charge upon her separate estate unless it contained an express provision to that effect.

Error to District Court of Las Animas County.

ACTION to declare a trust in the real estate of plaintiff in error.

In the year 1871 plaintiff in error was a married woman, living with her husband, Charles M. Farrand. Owing to domestic trouble, they concluded to and did separate. On or about June 21st of that year, in connection with such permanent separation, and as a part of the agreement therefor, Charles M. Farrand conveyed to plaintiff in error, and to C. H. Farrand, their minor son, in equal undivided parts, by absolute deed, certain real estate in Trinidad, of the value of \$5,000. At that time the said Charles M. Farrand was indebted to a number of persons, including defendant in error. . On September 13th of the said year (1871), plaintiff in error and the said C. H. Farrand executed to defendant in error their promissory note for \$493.95, payable three months after date; \$393.95 of the amount representing the said indebtedness of Charles M. Farrand to defendant in error, the remaining \$100 being a loan of cash to the said minor son, C. H. Farrand.

In 1877, the said note being unpaid, in whole or in part, defendant in error brought suit thereon against plaintiff in error. In his complaint he alleged the infancy of the said C. H. Farrand, the coverture of the

plaintiff in error at the time the note was made, and the other facts above narrated; also that plaintiff in error had succeeded, by deed of conveyance, to the moiety of the estate mentioned, held by the said C. H. Farrand. The complaint further alleged that the said conveyance by Charles M. Farrand was made subject to the agreement upon the part of plaintiff in error and C. H. Farrand to assume and pay the debts of the said Charles M. Farrand, including that of defendant in error; also that the note aforesaid, save as to the \$100 loaned as aforesaid, was executed in pursuance of an accounting and determination of the aggregate amount due from the said Charles M. Farrand to defendant in error, and likewise in pursuance of the trust agreement above mentioned. A final decree was entered on the 22d of March, 1880, recognizing a trust in the property in favor of defendant in error. To reverse that decree this writ of error was sued out.

Section 1515 of the General Statutes, referred to in the opinion, reads as follows: "No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing."

Messrs. YEAMAN and JOHN and BENEDICT and PHELPS, for plaintiff in error.

Messrs. WELLS, SMITH and MACON, for defendant in error.

HELM, J. All the facts connected with this suit existed during the year 1871. Hence we are obliged to consider the questions presented with reference to the

status and rights of plaintiff in error, as a *feme covert*, previous to the territorial acts of 1872 and 1874 on the subject of married women. The suit was commenced early in the year 1877, and before the present Code of Procedure became a law. We are therefore also to consider this case under the practice as it existed prior to the adoption of that instrument.

The record discloses a consideration for the note offered in evidence. Regarding it, so far as the obligation of defendant's husband is represented therein, as simply a promise to pay the antecedent debt of another, we find sufficient consideration to support the promise. There was the new loan of \$100 to her son, and the extension of three months on her husband's indebtedness. We do not think that, under the circumstances disclosed in this case, had the law then been as it now is, she could escape a personal judgment for the amount of the note. But being a married woman at the time she executed the promise, although living separate and apart from her husband, the note itself was not a binding contract at law. The statute then enacted with reference to married women left the common law unchanged in this respect. Against her objection, a legal action could not be maintained upon the note, personal judgment could not be obtained against her, and no execution could issue to be levied upon her property generally.

The decree cannot be sustained upon the ground that Beshoar, as a creditor of defendant's husband, was the beneficiary of a trust in the realty described therein. The property, upon the separation from her husband, was conveyed to her by an absolute deed. No agreement to pay the husband's debts is referred to in this deed, nor is there any pretense that the conditions of the trust were in any other manner reduced to writing. *Adams v. Adams*, 79 Ill. 517; *Learned v. Tritch*, 6 Colo. 433.

No actual fraud in connection with the conveyance is alleged or proven.

The answer filed in another cause, which was received in evidence against defendant, cannot be said to avoid the foregoing objection taken under the statute of frauds. Sec. 1515, Gen. St. This answer was not signed by defendant, nor was her name attached thereto by another as agent; and had defendant's name been signed to the instrument by her attorney, there is nothing to show that any such authority in the premises, as the statute requires, existed in writing. The trust theory must therefore be abandoned.

But plaintiff's counsel invoke the equitable doctrine that where a married woman, having a separate estate, contracts a debt on her own account, she will be held in equity to have created a charge upon such estate, even though the intention to do so is not expressly stated in the contract. 1 Bish. Mar. Wom. §§ 862, 863, and cases cited; 3 Pom. Eq. Jur. §§ 1124, 1126, and cases cited. It will be noted, however, that this accepted doctrine limits the liability of her separate estate to cases where the debt is contracted for her own benefit, or for the benefit of the estate itself; and, while there is considerable conflict in the decisions on the subject, we are of opinion that the decided weight of authority is in favor of the proposition that, if she is merely a surety, other persons, as in this case, receiving the entire benefit of the transaction, the liability of her separate estate does not attach unless the contract itself includes an express provision on the subject. 3 Pom. Eq. Jur. § 1126, *supra*, and cases cited.

Applying these principles to the case at bar, we find that the averments of the complaint do not state the cause of action to which counsel appeal, nor does the evidence relied on support any such cause of action. The promissory note upon which plaintiff sues contains no reference whatever to defendant's separate estate, nor does it embody any expression which could possibly be construed as evincing an intention to charge her estate.

The whole theory of the case, as shown by the complaint, the trial, and the findings and decree of the court, was that a trust existed in the estate in plaintiff's favor.

The decree will be reversed, and the cause remanded, with directions that the district court dismiss the complaint.

Reversed.

POMEROY V. ROCKY MOUNTAIN INS. & SAV. INST.

A policy of life insurance contained a provision that if the insured should become so far intemperate as to impair his health, or induce *delirium tremens*, it should become void. The insured allowed the policy to become forfeited, but, being indebted to the plaintiff, he transferred it to him, and the plaintiff arranged with the president of the company for its revival, and paid the sums required to keep the policy in force until the insured's death, which happened shortly after the revival. The president of the company knew the habits of the deceased at the time of the revival, and that he had become so intemperate as to injure his health. *Held*, that the knowledge of the president must be regarded as the knowledge of the company; that the company was bound by his acts in permitting the revival or renewal of the policy, and that the plaintiff could recover under the policy. HELM, J., dissenting.

Error to District Court of Arapahoe County.

THE complaint in this case avers:

That the Rocky Mountain Insurance & Savings Institution is a corporation existing under and by virtue of the laws of the state of Colorado, and was such corporation on and prior to the 20th day of April, 1878; that on said day said corporation, being authorized by law to do a life insurance business in said state, and to write policies or certificates for that purpose, and issue the same, did, by B. F. Johnson, its president, and W. L. McCauley, its assistant secretary, they being duly authorized, issue under its corporate seal, a certificate, commonly called a "Policy of Insurance," called by said

corporation a "Certificate of Membership," setting forth that the said corporation, in consideration of \$16 in hand paid, and of the semi-annual payment of \$2.50, to be paid on or before the 20th days of October and April, at noon, of each and every year during the continuance of the said certificate, and also in consideration of the payment of the amount assessed within thirty days next after each and every notice of the death of a member of the life insurance department of said company should be sent, did thereby constitute Lintner J. Barton (who was the husband of the defendant Elizabeth Barton) a member of said company; and by the said certificate the said corporation did agree, in the event of the death of said member, well and truly to pay at its office, in Denver, the amount of assessments which might be collected to pay the death claim of the said member whose life was thereby insured, not to exceed the sum of \$2,500, payable to his wife, Elizabeth M. Barton, for her use, benefit, etc., within three months after satisfactory proof of the death of said member, during the continuance of the said certificate; which agreement aforesaid was and is subject to certain conditions of forfeiture, among which are these: That if payment of the semi-annual premiums of \$2.50 required to be made on the 20th days of October and April of each year, as above stated, should not be made according to the terms of the said policy or certificate, or if payment should not be made of assessments due on the death of a member of the life insurance department of said corporation as required by said policy, or if the member insured as aforesaid should become so far intemperate as to impair his health, or induce *delirium tremens*, then, and in any such case, the certificate should be void. And the said policy contained also this further provision: That, in case the same should be assigned, the assignment should be made on the back of the same, in conformity with the rules of the company, and a copy of the said assignment be delivered at the

office of the company, in Denver, immediately after its being made, and due proof of the interest of the assignee be produced with the proof of the claim, in case of death.

And the plaintiff avers, on information and belief, that at the time of the issuing of said certificate or policy the said Lintner J. Barton in fact paid the sum of \$16, and the said policy was delivered to him; that afterwards, and on or about the 22d day of October, 1878, the said Lintner J. Barton was in default as to his payments and dues on said policy or certificate, and the same became forfeited or was declared by said company to have become so; and he, the said Lintner J. Barton, was also indebted to the plaintiff at that time in a large amount of money, that is, the sum of \$599.15, for which he had given his note, dated September 2, 1878, with interest at the rate of two per cent. per month until paid, and at the same time, to secure the same, had delivered to said plaintiff the aforesaid policy, which indebtedness the said defendant Elizabeth Barton had promised to pay to the plaintiff.

And the plaintiff avers that said Lintner J. Barton, on the 22d day of October, 1878, was also without means of paying what might be required to revive and keep in force the said policy or certificate; and the plaintiff further avers that in this condition said Lintner J. Barton applied to the plaintiff for assistance in the premises, and for further advances, and offered to indorse the said policy to plaintiff to secure him in so doing; that thereupon the plaintiff and said Lintner J. Barton applied at the office of said corporation, and to the said Johnson, who was the president and general manager of said corporation, with full power to write insurance and to represent the said corporation, and then and there stated to said Johnson that, in consideration of the indebtedness aforesaid, and advances to be made as aforesaid, and money to be paid by the plaintiff to revive the said policy, if the same could be done, the said policy was to be as-

signed to the plaintiff; that thereupon said Johnson, acting as aforesaid, directed said Lintner J. Barton to make upon the back of said policy an assignment of the same, as follows:

“DENVER, October 22, 1878.

“For value received, I hereby assign and transfer to Morris Pomeroy all of my right, title and interest in and to the within policy of insurance, as security for money borrowed.

“ELIZABETH M. BARTON, by her husband.

“L. J. BARTON, for himself.”

Which assignment the said L. J. Barton made as aforesaid, for the sole purpose aforesaid, in consideration of which assignment, and the securing thereby of the past indebtedness aforesaid, the plaintiff paid the dues and assessments required to revive and keep in force said policy, amounting to the sum of about \$20, and received the said policy of insurance aforesaid, and has since retained the same, the said Johnson assuring the plaintiff that said assignment was proper, and sufficient to transfer the said policy to the plaintiff, and that, although said policy has become forfeited, yet the same had been revived for the purpose aforesaid, and stood as security for the plaintiff as aforesaid; that from thence afterwards, until the death of said Lintner J. Barton, the plaintiff made the payments, from time to time, required to keep said policy in force, amounting to the sum of about \$6.75; that the defendant Elizabeth M. Barton, as the plaintiff is informed and believes, never had the possession of the said policy, never paid anything to procure the same, or to keep the same alive, and did not know of its existence till after the death of said Lintner J. Barton, or, if she did, she treated the same as the property of said Lintner, and assented to his using it as his; that in equity the same belonged to the said Lintner J. Barton until after the transfer of the same to the plaintiff, and now in equity belongs to the plaintiff, to the extent of

the indebtedness from said Lintner J. Barton to the plaintiff at the time of his death, including advances made, as aforesaid, with interest at the rate of two per cent. per month, as per agreement between said Lintner J. Barton and the plaintiff.

And plaintiff further avers that on or about the 8th day of March, 1879, said Lintner J. Barton died intestate and insolvent, leaving the defendant Elizabeth M. Barton, his widow, surviving him; that thereafter, and on or about the 8th day of May, 1879, proofs of said death, and of the plaintiff's interest in said policy, were made by the plaintiff, and accepted by said corporation; that the amount of such interest—that is, of the indebtedness from said deceased to the plaintiff—at that time amounted to the sum of about \$555.30, all of which, with interest since that date, is due and unpaid.

And the plaintiff further avers that the said corporation [interlineation by plaintiff, as amended, as follows] “has been, since the death of said Lintner, requested by the plaintiff, as well as by the said Elizabeth M. Barton, to make the assessment upon its members required by its rules and regulations, for the death claim due by reason of the death of said Lintner J. Barton, and to pay over the said assessment, both of which said company refused to do; and has been also since said death” frequently requested to pay the amount due, according to the terms of said policy, but refused to pay the said sum of \$2,500, or any part thereof, or any part of any assessment aforesaid; alleging, as a ground of such refusal, and as the only ground thereof, that said Barton, deceased, either died of *delirium tremens*, or became so far intemperate as to impair his health.

And the plaintiff avers, on information and belief, that said deceased did not die of *delirium tremens*, or become so far intemperate as to impair his health, after said policy or certificate was so renewed or revived, but the plaintiff avers that he was not aware of the existence of

the said clause regarding intemperance and *delirium tremens* until after the death of said deceased; that said Johnson, when acting on behalf of said corporation, knew the habits of said deceased, and that he was, at the time of the renewal or revival of said policy, intemperate and was likely to continue so; that his intemperance was such as to impair his health; and yet the said corporation permitted the said plaintiff to make payment to revive and renew said policy and extend the time of payment of the said indebtedness, and to make advances aforesaid on the faith of the renewal or revival and assignment of said policy or certificate as aforesaid, and continued thereafter to receive payment of dues and assessments on said policy from the plaintiff, and is estopped to say that intemperance impaired the health or caused the death of said deceased.

And the plaintiff further avers that he is informed and believes that said defendant Barton is claiming the money due from said corporation adversely to the plaintiff, as her own property; but which claim of the said defendant the plaintiff, on information and belief, avers to be false and illegal, and that in equity the plaintiff is entitled to the moneys aforesaid to the extent of the amount due from said deceased, at the time of his death, to the plaintiff, with interest as aforesaid.

Wherefore the plaintiff seeks the equitable interposition and assistance of the court herein, that the said defendants may be summoned and required to answer the premises, and all and singular the matters and things herein contained; and demands judgment against the said corporation for the said sum of \$2,500; and that out of whatever sum may be recovered, as aforesaid, the amount of indebtedness owing from said deceased to the plaintiff at the time of his death may be first paid, and the residue thereof only paid to the said defendant Barton, and that plaintiff recover costs.

Demurrer, *inter alia*, "that said complaint does not

state facts sufficient to constitute a cause of action." Demurrer sustained and judgment for defendant.

Messrs. STUART BROS., for plaintiff in error.

Messrs. B. F. HARRINGTON and W. W. COVER, for defendant in error.

ELBERT, J. Johnson was the president and general manager of the defendant company, and had charge of its home office, at Denver, with full power to write insurance and to represent the company. The company is bound by his acts in issuing the policy of insurance, in permitting its renewal and assignment, and in receiving the back dues necessary to its renewal, and the premiums thereafter becoming due. Bliss, Life Ins. § 278; Whart. Ag. § 202; Wood, Fire Ins. §§ 383, 391. His knowledge touching the condition of health of the insured must be regarded as the knowledge of the company. Story, Ag. § 140; Bliss, Life Ins. § 76 *et seq.*; Ang. & A. Corp. § 305; Whart. Ag. § 184.

Johnson having permitted the renewal of the policy, and its assignment, with full knowledge of Barton's impaired health by reason of his intemperate habits, and with full knowledge that the plaintiff renewed and took an assignment of the policy as a security for advances already made, and thereafter to be made, having at the time received from the plaintiff payment of all back dues necessary to its renewal, and thereafter payment of the premiums on the policy as they became due, is to be regarded as having waived the condition respecting the impairment of health of the insured by intemperate habits. The company cannot be allowed to treat the contract as valid for the purpose of collecting dues, and as void when it comes to paying the insurance; or, as otherwise stated, "the company cannot be permitted to occupy the vantage ground of retaining the premium if the party continued in life, and repudiating it if he died." *Insur-*

ance Co. v. McCain, 96 U. S. 84; *Home Ins. Co. v. Duke*, 84 Ind. 253; *Brandup v. St. Paul F. & M. Ins. Co.* 27 Minn. 393; *Alkan v. New Hampshire Ins. Co.* 53 Wis. 136; *Frost v. Saratoga Mut. Ins. Co.* 5 Denio, 154; *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 533; *Miller v. Mutual Ben. Life Ins. Co.* 31 Iowa, 216; *Williams v. Niagara Fire Ins. Co.* 50 Iowa, 561; *Bevin v. Connecticut Mut. Life Ins. Co.* 23 Conn. 244; *Home Mut. F. Ins. Co. v. Garfield*, 60 Ill. 124; *Reaper City Ins. Co. v. Jones*, 62 Ill. 458; *Lycoming Ins. Co. v. Barringer*, 73 Ill. 230; *Peoria M. & F. Ins. Co. v. Hall*, 12 Mich. 202; *Short v. Home Ins. Co.* 90 N. Y. 16; *Bennett v. North B. Ins. Co.* 81 N. Y. 273; *Whited v. Germania F. Ins. Co.* 76 N. Y. 415; *Buckbee v. United States Ins. Co.* 18 Barb. 541; *Putnam v. Commonwealth Ins. Co.* 18 Blatchf. 368 (U. S. C. C.); Bliss, *Life Ins.* § 278 *et seq.*, and cases there cited; Wood, *Fire Ins.* "Waiver," ch. 20; "Estoppel," ch. 21, and cases there cited.

If there was collusion between the plaintiff and Johnson, the president, to defraud the defendant company, it is matter of defense, to be pleaded.

While it appears from the complaint, generally, that the defendant company is a mutual company, we are not prepared to admit the proposition that that fact necessarily takes the case without the operation of any of the rules which we have stated. Theoretically, the insured in mutual companies are members of the company, but immunity from the above rules would not follow from that relation alone. The charter and by-laws of the company are not before us, nor are we advised that they prescribe any form of policy or limitation upon the powers and duties of the general officers and agents of the company that would exempt the company from liability in this case. As the record stands, the question made by counsel in this behalf is not fairly presented, and we intimate no opinion respecting it.

The court erred in sustaining the demurrer to the com-

plaint. The judgment must be reversed, and the case remanded.

HELM, J. (*dissenting*). Construing the averments of the complaint filed in this case, under established principles of law and rules of pleading, I am of the opinion that plaintiff ought not to recover upon them. To my mind the complaint must be regarded as showing that when plaintiff procured the renewal of the policy he had knowledge of Barton's impaired physical condition, and that such impairment was the result of intemperance. Having been in no way deceived, misled or imposed upon, he cannot be heard to say that he was ignorant of the clause in the policy avoiding the contract upon this ground. The legal inference from the averment made on the subject is that the death of Barton, ten weeks after the policy was renewed, resulted from Barton's impaired health and intemperate habits, existing at the time of such renewal.

If these conclusions be legitimately drawn, they show an attempt on the part of plaintiff to indemnify himself through a policy of insurance which he must be held to have known ought not to issue. The fact that Johnson had knowledge of the assured's impaired physical condition, coupled with the principle that insurance companies are bound by the knowledge of their officers and agents, does not answer my objection. Assuming that no distinction should be made between the mutual and the old line companies in this respect, I do not believe that Johnson's knowledge amounted to a waiver of the condition in question. In the first place this is not a case where the waiver of a condition in the contract *subsequent to its execution* is claimed to have occurred. On the contrary, reliance is placed upon the proposition that the condition, though inserted by the parties, was waived at the *inception* of the contract. And, secondly, the doctrine of waiver, predicated upon the knowledge of offi-

cers or agents, is recognized for the purpose of protecting *innocent third persons* dealing with insurance companies. It ought to have no application where the other contracting party is acting in bad faith. The law does not wholly ignore the rights and interests of innocent members and stockholders in these corporations; and I take it that, if an officer or agent and an outside party conspire to perpetrate a fraud upon the company, the courts will not lend their aid to its consummation. The fraud appearing in this case upon the face of the complaint, it was unnecessary, in my judgment, to plead it by answer. The demurrer sufficiently presented the issue. I do not say that, in fact, plaintiff actually intended to perpetrate a fraud upon the company. He may have been ignorant of the intemperance clause in the policy, as he asserts. He may also have been ignorant of the fact that insurance companies do not knowingly accept risks upon parties who are so low with disease that death is only a question of a few days or weeks at the utmost. What I assert is that the law, under the facts disclosed by his complaint, does not permit him to plead or rely upon his ignorance in these respects.

For the foregoing reasons I feel constrained to dissent from the conclusion reached by a majority of the court.

I think the judgment of the district court should be affirmed.

Reversed.

LAFFEY AND OTHERS V. CHAPMAN.

1. A bill of exceptions which is neither signed nor sealed by the judge cannot be considered on appeal.
2. In an action of unlawful detainer, where the plaintiff claimed under a decree in connection with a certificate of purchase, and the only allegation in the complaint concerning the nature or provisions of the decree was "that under and by virtue of being the

owner of said certificate, and under the power and authority of the district court of said county, and the decree upon which said certificate of sale was issued, this plaintiff is entitled to the possession of said lode, with all appurtenances," held to be simply a conclusion of law, and not sufficient to constitute a cause of action.

Error to County Court of Clear Creek County.

Mr. W. T. HUGHES, for plaintiff in error.

Messrs. THOS. J. CANTLON and JOHN C. FITNAM, for defendant in error.

ELBERT, J. This is an action of unlawful detainer under section 3 of the act concerning forcible entry and detainer. Gen. St. 502. What purports to be a bill of exceptions is neither signed nor sealed by the judge, and cannot be considered.

It is objected, however, that the complaint does not state facts sufficient to constitute a cause of action, and this objection we think well taken. The decree under which, in connection with her certificate of purchase, the plaintiff claims to be entitled to the possession of the premises in dispute, is very imperfectly alleged. We are not told the time when, the place where, or the court in which (except inferentially), the decree was rendered. We are not advised who were the parties, nor is it alleged that the defendants were either parties or privies to it. There is not a single allegation respecting the nature or provisions of the decree. Every fact concerning it is withheld. The only allegation is "that under and by virtue of being the owner of said certificate, and under the power and authority of the district court of said county, and the decree upon which said certificate of sale was issued, this plaintiff is entitled to the possession of said lode, with all appurtenances." The certificate of sale would not entitle the plaintiff to possession prior to the expiration of the time for redemption and the delivery of the sheriff's deed. The allegation

that the plaintiff is entitled to recover by virtue of "the decree upon which said certificate of sale was issued" is simply a conclusion of law, which, as a rule, ought not to be pleaded. The complaint should have set forth the provisions of the decree sufficiently for the court to judge of the plaintiff's rights under it. It was not the intention that section 69 of the code should dispense with so plain a rule. As the pleadings stand, we are unable to say that the plaintiff was entitled to recover in this action, or in any action.

The judgment of the court below must be reversed.

Reversed.

TERPENING V. HOLTON.

9	306
15a	815
9	306
19a	470
9	306
20a	508

1. Good practice requires that an order of reference should state whether it was made on the agreement of parties, upon the application of one party, or on the motion of the court.
2. In an action in which the circumstances authorizing a compulsory reference under the Code of Civil Procedure do not exist, where the order fails to show that the reference was by consent, and it appears from the transcript that the appellant did not object to the validity of the order or the jurisdiction of the referee, either before the referee, or in court before the entry of judgment upon his report, and that he appeared before the referee, and proceeded to the trial of the matters submitted, the appellant's conduct will operate as a waiver of his right to object, and the reference will be upheld on appeal.
3. Where a reference covers the whole issue before the court, the clerk may enter judgment upon his report without any order of the court; and previous to the act of April 10, 1885, no notice was required before doing so.
4. Evidence of the contents of a deed is not admissible until the fact of its loss has been established.
5. Where the proof already offered has revealed that the sale of a mining claim relied upon was evidenced by a written instrument, the party relying upon the sale must produce the writing, or account for its absence, and evidence of a parol sale is not admissible.

6. That part of section 192 of the Code of Civil Procedure authorizing the clerk to enter judgment upon a referee's report is not, as an attempt to make the finding of the referee the finding of the court without its submission to the court, a violation of article 6, section 1, of the state constitution relative to the judicial power.

Appeal from District Court of Ouray County.

THE relief sought by the complaint was to quiet title to a mining claim. The defendant Holton was alleged to be one of the original discoverers, and to have been possessed of an undivided one-half interest therein. The plaintiff, who is appellant here, alleges a sale and conveyance by Holton of his interest to one Morgan, and a conveyance by Morgan to the plaintiff. The complaint further states that the deed from Holton to Morgan was transmitted for record, and lost *in transitu*. Holton's answer denies the sale, the execution and existence of the deed, and the fact of its loss. The cause was referred to a referee for trial of the issues, and the testimony was closed without proof of the loss of the deed. The remaining facts are stated in the opinion.

Mr. CALDWELL YEAMAN, for appellant.

Mr. CHAS. H. TOLL, for appellee.

BECK, C. J. The first error assigned, and the first proposition discussed, by counsel for appellant, is that the court erred in referring this cause to a referee. Counsel assumes that the reference was made by the court on its own motion, and that it was made in violation of the statute, since the circumstances which authorized a compulsory reference under the Code of Civil Procedure did not exist. No long account was to be examined on either side; the taking of an account was not necessary for the information of the court; no question of fact arose, otherwise than upon the pleadings; and the action was not of the character denominated a special proceeding. Code, § 186. Whether the order, therefore,

be construed as directing the referee to try the issues and report a judgment, or to report a finding of facts which would have the effect of a special verdict, viewed as a compulsory order, it was issued without lawful authority for either purpose; and in such case a valid judgment could not be rendered or entered upon the report. *Bonner v. McPhail*, 31 Barb. 106, 116; *Scudder v. Snow*, 29 How. Pr. 95.

But in support of the judgment it is argued, as a legal inference arising upon the record, that the order of reference was not compulsory, but it was made upon consent of the parties litigant. In support of this proposition we are referred to the fact, appearing of record, that both parties appeared before the referee and submitted their testimony on the issues presented by the pleadings, without raising any objection as to the regularity of the appointment of the referee or the validity of the order of reference. As a question of practice, the order should state whether it was made on the agreement of the parties, upon the application of one party or on the motion of the court; but a failure to preserve in the record proper, as is the case here, the circumstances and manner under which the order was made, while amounting to an irregularity, does not, according to the current of authority, afford grounds of reversal on appeal, where both parties, without objection or exception in this behalf, appear before the referee and submit to a trial upon the merits. It is true that the power of referring causes to a referee for trial is a statutory power, and, in order to invest the referee with jurisdiction, must be exercised in the manner provided by the statute. When so exercised, the referee is vested with jurisdiction to act for both judge and jury in the trial of legal actions, and to act for and in place of the court in the trial of equitable actions. If the court assume, of its own motion, to refer for trial to a referee a cause requiring the consent of the parties, no obligation is thereby imposed upon either

party to observe the order or to attend before the referee, and the rights of a party who declines to attend are not prejudiced. In such a case the jurisdiction of the referee must affirmatively appear.

The principle involved is analogous to acquiring jurisdiction of a party by service of process. But in such a case, if the record be silent as to consent, the subsequent conduct of the parties may supply evidence tending to show that they in fact consented to the reference. As appearing to the action without objection when not served with process will waive the right to raise that objection afterwards, so appearing before a referee, and tacitly consenting to his jurisdiction over the subject-matter and of the parties, will waive the right to question his jurisdiction after judgment, on the ground above mentioned. Wells, Jur. 51, 74. See, also, as to irregular references, *Bucklin v. Chapin*, 35 How. Pr. 155.

In the present case there is nothing in the record before us showing whether the consent of the parties was obtained before the reference was ordered or not. The order of reference is silent upon the point, and the transcript does not purport to give all the record entries, nor does it purport to contain copies of all papers filed in the case, but those only which are mentioned in appellant's *præcipe*. Upon this record we cannot say that the court, of its own motion, referred the issues to a referee for trial, and that it did not act upon the consent of the litigants in making the order. For anything appearing in the record, or stated in the clerk's certificate attached thereto, the reference may have been ordered, in the language of section 185, "upon the agreement of the parties filed with the clerk."

The following conduct and acts of the appellant tend strongly to indicate that he consented to the order of reference: He appeared before the referee in person and by attorney, without objection, and submitted the proofs of his claim for relief. He excepted to the rulings of

the referee which were unfavorable to him, including his report and his findings of fact and conclusions of law. After the report was filed in the district court appellant filed specific exceptions thereto, and he afterwards filed a motion to set aside the report, setting out in detail the reasons why it should be set aside. This motion, and the exceptions mentioned, were overruled by the court, when the appellant filed a motion to vacate the judgment, assigning several grounds of error; but in all the exceptions reserved to the rulings and findings of the referee, and in all the grounds assigned in support of the application to set aside the referee's report, and to vacate the judgment, not a single objection was raised to the validity of the order of reference, or to the jurisdiction of the referee. It is well settled that a party may waive a constitutional or statutory right existing in his favor; and we must hold that the conduct of the appellant in this case, and his failure to question the jurisdiction of the referee in the court below, must operate as a waiver of such questions on appeal from the judgment. The presumptions of law are in favor of the regularity of the proceedings of the district court.

The second proposition laid down and discussed by counsel for appellant is: "The referee should have made his report to the court in obedience to the order, and the court should have affirmed it and ordered judgment to be entered, the clerk having no authority to enter judgment on the referee's report for the reason that the referee was not authorized to enter judgment by order of reference, but simply to report to the court." If this proposition be correct, then the second and third grounds of error are well assigned, viz.: *Second*, the court below erred in overruling the plaintiff's motion to set aside the report of the referee; *third*, the court below erred in overruling plaintiff's motion to vacate the judgment, and for a new trial.

The mode of procedure indicated in the second proposition would be a good rule of practice in all cases where

the rulings and decisions of a referee are objected to and exceptions to the report and findings filed, as contemplated by section 190. The rule would include the case at bar, since the rulings and decisions of the referee were objected to on the hearing, and no opportunity was afforded, as the statute then stood, to file exceptions to the report and findings prior to the entry of judgment. But it does not necessarily follow that a different mode of procedure would invalidate the judgment. In the absence of statutory provisions or rules of court to the contrary, the current of authority is to the effect that, under similar code provisions, a confirmation of the report is not requisite to the authority of the clerk to enter up judgment.

Section 272 of the New York code, as amended in 1857, provided that "the trial by referees shall be conducted in the same manner and on similar notice as a trial by the court. * * * They must state the facts found and the conclusions of law separately, and their decision must be given and may be excepted to and reviewed in like manner, but not otherwise, and they may, in like manner, settle a case or exceptions. The report of the referees upon the whole issue shall stand as a decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. When the reference is to report facts, the report shall have the effect of a special verdict." Under this section the New York courts held, prior to an amendment of the act in 1870, that the report of the referee was to be filed like a decision of a judge, and that it was the duty of the clerk to enter up judgment thereon at once; that, as a rule, the report did not require confirmation, except where it was intended to be the foundation of a future discretionary act of the court. It was also held to be no ground for vacating a judgment that it was entered without leave of the court and without notice. *Heinemann v. Waterbury*, 5 Bosw. 686; *Griffing v. Slate*, 5 How. Pr. 205; *Bouton*

v. Bouton, 42 How. Pr. 11; *Currie v. Cowles*, 7 Rob. (N. Y.) 3.

In California, under a similar code provision, it was held that a report of a referee upon the whole issue stands as the decision of the court, and that upon filing the record the clerk enters judgment thereon as of course. *Sloan v. Smith*, 3 Cal. 406; *Peabody v. Phelps*, 9 Cal. 224.

Was the referee authorized to render judgment by the order of reference? It may be conceded that the order of reference was informal, but we think it must be construed as referring to the referee, for trial, all the issues in the action, whether of fact or of law, as contemplated by the first subdivision of section 187, being now section 185. It was so construed by the referee, by the parties, and by the court below. The referee tried the issues raised by the pleadings, determined the rights of the parties, and then, in conformity with the order of reference and with the statutes, reported to the court his findings of fact and conclusions of law; also the testimony taken, and objections thereto. No objections were raised or exceptions reserved, in the court below, to the validity of the reference, or to the jurisdiction of the referee to try the issues; and the order of reference being, in our judgment, broad enough to cover the action taken under it, the authority of the referee must be sustained. It follows, therefore, that the objection to the clerk's authority to enter up the judgment on the report filed is groundless.

Respecting the complaint that the judgment was entered immediately upon the filing of the report, and without previous notice to the appellant, it is to be observed that, as the law then stood, notice was not required. The entry of judgment, however, did not deprive appellant of any substantial objections which he may have reserved to the proceedings. Objections could have been and were presented on a motion to vacate the judgment and

for new trial. This is the doctrine of the authorities to which we have referred.

As regards the several objections raised in behalf of the appellant in the court below, we have examined them, and find none of them to be of a substantial character.

In respect to the exclusion of parol proof of the contents of the deed alleged to have been executed by defendant Holton to Morgan, the appellant's grantor, the ruling is sustained by well-settled principles of law. One of the modes of acquiring title to mining claims is by deed from the owner, which is the mode stated in the complaint whereby the appellant acquired the title in controversy. It is further stated therein that Morgan acquired his title by deed from Holton, who was one of the original locators, and that this deed was lost while being transmitted for record. The answer denies the sale to Morgan, and that such a deed as that alleged to have been lost was executed, or ever existed. Appellant having introduced witnesses who testified that such deed was executed and delivered, evidence of its contents was not admissible until the fact of its loss had been first established. *Bruns v. Clase*, ante, p. 225.

Appellant also offered to prove a parol sale of the claim by Holton to Morgan, and his counsel now cites us to the doctrine laid down in *Patterson v. Keystone M. Co.* 30 Cal. 360, holding that, where a written conveyance of a mining claim is pleaded, a verbal conveyance may be proven. This case, however, proves too much, since it holds that, if the sale be in writing, it must be proven by producing the writing, or by proof of its contents, after first establishing the fact of its loss.

As to the motion made by the appellant, on the next day after the closing of the testimony, for leave to amend the pleadings to conform to the proof, we perceive no abuse of discretion in the denial thereof. This motion, which was in writing, did not state what amendments

appellant desired to make in the pleadings. If he proposed to strike out the averment of the written sale, and to substitute therefor an averment of a parol sale, the amendment would have availed him nothing under the authority cited. Appellant had already proven by witnesses that the sale relied upon was evidenced by a written instrument, and the rule which requires the production of the best evidence would have required him to produce the writing, or to account for its absence. He failed to do either on the trial. Leaving out of view, therefore, the testimony of the appellee, which was to the effect that no sale, either written or parol, was ever made to Morgan, the character of the appellant's testimony would not have entitled him to recover by a mere amendment to the pleadings.

Appellant's third proposition is: "If section 192 of the code attempts to make the finding of the referee the finding of the court, without its submission to the court, and authorizes the clerk to enter judgment on such finding without its being first submitted to the court, such part of the section is unconstitutional."

The constitutional provision supposed to be violated is section 1 of article 6: "The judicial power of the state, as to matters of law and equity, except in this constitution otherwise provided, shall be vested in a supreme court, district courts, county courts, justices of the peace, and such other courts as may be created by law for cities and incorporated towns."

This is a usual provision of state constitutions, and has not been held to interfere with statutory regulations prescribing the mode, manner and time for the performance of judicial acts, and the entry of judgments. When a statute authorizes proceedings to be prosecuted to final judgment upon consent of parties in a mode which, but for such consent, would be liable to constitutional objections,—as the trial of the issues before a referee,—the consent of the parties operates as a waiver of objec-

tions. The same principle was invoked, before the adoption of the code, to sustain summary proceedings. Thus, in a judgment by confession, the entire proceedings, from the filing of the complaint to the entry of judgment, might occur in vacation, if the statute so provided. So of the proceeding by arbitration, wherein the parties litigant consent to submit their differences to certain persons not in judicial authority, whose adjudication shall be filed in court, and judgment entered thereon. Analogous in principle to the foregoing examples is that of judgment by default. In this instance no express consent is given. The court acquires jurisdiction of the subject-matter, and of the person of the defendant, by the filing of the declaration or complaint, and by the service of its process. Ample time and opportunity being afforded the defendant to appear and interpose a defense to the action, his neglect to do so was construed as a waiver of his rights, and as an implied consent to the entry of judgment.

The decisions of this court, to which we are referred by counsel, holding that valid judgments could not be entered in vacation, are based upon the absence of statutory authority; all having occurred prior to the adoption of the Civil Code. The doctrine of these cases is that consent alone, in the absence of statutory authority, will not confer jurisdiction. Thus, in *Filley v. Cody*, 4 Colo. 110, wherein the parties had stipulated that the motion for a new trial should be heard and determined in vacation, and, if denied, judgment should be rendered as of the trial term, the court held, on principle and on the authority of *Cooper v. American Ins. Co.* 3 Colo. 318, that, in the absence of statutory authority, a judgment rendered in vacation was void. In *Kirtley v. Marshall Silver Min. Co.* 4 Colo. 111, a demurrer to the bill was, by stipulation of the parties, heard and decided in vacation; and, the demurrer being sustained, a decree was entered up dismissing the bill. The court say: "This

was error. In vacation, under the old system of practice, the judge had no authority to render the decree. The court alone had power to hear and determine the issue raised by the demurrer. To hold that the decree is valid would be to assert that parties may confer jurisdiction by consent, which cannot be admitted." Other cases are to the same effect.

But the present case arises under a different system of practice,— a system which provides statutory authority for the acts performed. And, in addition to such authority, the proceedings here were sanctioned by the consent of the parties. It is a feature of the code system that much judicial work may be performed in vacation; and, if we were compelled to rule in this case in the manner insisted upon by appellant's counsel, it would seriously embarrass the courts in their practice under this system. The code authorizes the entry of judgments, in certain cases, without the actual presence of either the court or judge. It is true, as shown by Chief Justice Dixon in *Wells v. Morton*, 10 Wis. 423, that this has always been done; but it was done covertly, and cloaked over by a fiction whereby it appeared as if it had been done at the preceding term.

The opinion of this court in *Phelan v. Ganabin*, 5 Colo. 14, contrasted with the prior decisions referred to, illustrates the effect of statutory regulations upon the course of judicial proceedings. Section 150 of the code, as originally enacted, authorized judgments to be entered up by the clerk in vacation, in the cases therein specified, on failure of the defendants to appear and demur or answer. The opinion adverts to the fact that the courts of many of the states have acted under similar statutory provisions for many years, and that the validity of the judgments so entered have been upheld by the decisions of the highest courts of the code states. The learned justice further says that the theory upon which judgments in such cases are founded is that the judgment is the sen-

tence which the law pronounces as the sequence of statutory conditions; that the statute directs the judgment; and that the clerk acts as the agent of the statute in entering it upon the records of the court.

In the present case the issues were referred to a referee for trial, by consent. He was ordered to report his findings and conclusions in vacation. The statute required the clerk to enter judgment thereon, upon the filing of the report. This, however, did not operate to deprive appellant of his right to have all the proceedings fully reviewed by the court. *Hattenback v. Hoskins*, 12 Iowa, 109; *Roberts v. Cass*, 27 Iowa, 225.

These views do not conflict with those announced in *Haverly I. M. Co. v. Howcutt*, 6 Colo. 574, wherein it was held that a judge of a court cannot, even by consent of parties, vacate his seat upon the bench, and authorize a member of the bar to administer the judicial office in the trial of a cause. In one case the testimony is reported to the court, together with the rulings of the referee and exceptions thereto, while the court, retaining its jurisdiction over the cause, may reverse such rulings and findings, and render a wholly different judgment from that reported by the referee; but in the other case the powers of the court itself would be usurped by a citizen who has not been chosen to the judicial office in the manner provided by the constitution, and who may not possess the constitutional qualifications therefor. In one case the court maintains its constitutional organization, and its jurisdiction over the cause as well, while in the other the proceeding would be outside of any legally constituted authority.

Being of opinion that no substantial errors have intervened, the judgment will be affirmed.

Affirmed.

9	318
24	404

BOARD OF COUNTY COM'RS OF ARAPAHOE CO. V. CROTTY.

The board of county commissioners adjudged the bond of a justice of the peace insufficient, and refused to approve the same. Proceedings were instituted for a writ of *mandamus* to compel the board to approve the sureties. *Held*, that *mandamus* would not lie to control the board's discretion in the matter; it being authorized by statute (section 1942, Gen. Laws) to judge of the sufficiency of official bonds of this character.

Error to the Superior Court of Denver.

ONE of the sureties on the official bond of the defendant in error, who was a justice of the peace of Arapahoe county, gave notice to the board of county commissioners, as provided by law, that he was not longer willing to be such surety. Thereupon the county clerk notified said justice of the fact, and likewise that the board of county commissioners required him to file other surety as required by law. The justice filed a new bond, which the said board of county commissioners, at a regular meeting held five days afterwards, adjudged insufficient, and refused to approve. The defendant in error thereupon instituted this proceeding in the superior court of Denver, for a writ of *mandamus* to compel the board to approve the sureties, alleging their sufficiency, and alleging, on information and belief, that the action taken by said board was with a view of making it impossible for the petitioner to give a bond that the board would approve in order that it might declare the petitioner's office vacant. The court granted an alternative writ, whereupon the attorney of the board appeared in court, and raised the question of the court's jurisdiction to grant the relief sought by demurring to the petition. The court overruled the demurrer, and awarded a peremptory writ, commanding the board to approve the bond. This writ of error was sued out, and, being made to operate as a *supersedeas*, stayed the execution of said writ.

Mr. WM. B. MILLS, County Attorney, for plaintiff in error.

BECK, C. J. The rule is well established that, where the exercise of official discretion or official judgment is required of an officer or board, *mandamus* will not lie either to control the exercise of such discretion, or to determine what judgment shall be given. If an officer or board of officials, vested by law with discretionary powers, refuse to act, *mandamus* is the proper remedy to compel action, but not to interfere with the exercise of official discretion or judgment. High, Extr. Rem. § 42, and authorities cited.

By section 1942, Gen. Laws, the board of county commissioners is authorized and empowered to judge of the sufficiency of official bonds of this character and to approve the same. Upon tender of the new bond the board appears to have taken prompt action to investigate its sufficiency. The result of that investigation was expressed by its resolution, in these words: "It is deemed that said bond is insufficient for the public security." If, then, the order for the peremptory writ be sustained, it must be sustained on the theory that the bond is sufficient, notwithstanding the action of the board of county commissioners. But to so decide would be to set aside the official judgment and discretion of the body authorized by law to determine the sufficiency and to approve such security, and to substitute therefor the judgment and discretion of a tribunal not clothed by law with such powers. It is plain, therefore, that the judgment cannot be sustained. *Howland v. Eldredge*, 43 N. Y. 460.

Judgment reversed and cause remanded, with directions to the superior court to dismiss the proceeding at the cost of the petitioner.

Reversed.

OPPENHEIMER v. DENVER & R. G. R. Co.

9	330
15	101
9	330
19	273
9	330
18a	486

1. The jury are the judges of the credibility of witnesses, and the court will not review their findings upon questions of fact unless they are palpably against the weight of the evidence.
2. In an action to recover damages for the wrongful act of the defendant, where the jury return a verdict for the defendant, objections to the instructions of the court relative to the measure of damages in case the jury should find for the plaintiff will not be considered upon appeal.
3. Parol evidence of the contents of a writing is admissible upon proof of the loss of the writing.
4. Where the plaintiff sues for damages for wrongful ejectment from a train upon which he was traveling by virtue of a mileage ticket, and the defendant pleads that the ticket was issued upon the condition, of which plaintiff had notice, that it was not available over that portion of the road upon which he was traveling, evidence that the defendant had sold the same kind of ticket to another person about the time of the sale to plaintiff, and that such ticket was used without objection by the company, is inadmissible.

Error to District Court of Arapahoe County.

THIS was an action brought by the plaintiff in error against the defendant railway company to recover damages for an alleged ejectment from one of the defendant's trains. The main issue in the trial of the case in the court below was whether the plaintiff, at the time he purchased his mileage tickets, was notified by the agents of the defendant company that they would not be accepted for fare over that portion of the company's road between Salida and Leadville. Verdict for the defendant, and judgment thereon. The points decided do not require any more extended statement of the facts.

Mr. GEO. H. KOHN, for plaintiff in error.

Mr. E. O. WOLCOTT, for defendant in error.

ELBERT, J. 1. There is no ground for saying that the verdict in this case is so palpably against the weight of evidence as to call for the interference of this court.

The witnesses Eccles and Sheppard both testified that they notified the plaintiff that the mileage tickets which he purchased were not good over that portion of the defendant's road between Salida and Leadville. The jury accepted their testimony as against that of the plaintiff, who testified affirmatively that there was no such notification, and the witness Eppstein, who testified negatively that he heard no conversation on the subject. The jury are the judges of the credibility of witnesses, and we see no reason to question their finding in this case.

2. The objections taken to the instructions of the court need not be considered. That portion of the charge to which they are taken concerns the measure of damages, and was for the guidance of the jury only in case they should find that the plaintiff was entitled to recover. The jury having found upon the main issue that the plaintiff, by reason of his notice that the ticket was not good for fare between Salida and Leadville, was not entitled to recover, that portion of the charge objected to had no use or office to fulfill. For a like reason, the objection that the plaintiff was not allowed to testify in rebuttal of the testimony given by the conductor and brakeman need not be considered. The jury having found against the plaintiff upon the main issue, the testimony of the conductor and brakeman upon the point sought to be rebutted was of no importance.

3. The tickets purchased by the plaintiff, concerning which the controversy arises, contained a condition that they should be good only on those portions of the defendant company's railroad where the defendant company's regulations warranted their acceptance. The plaintiff had notice of this condition at the time he purchased the tickets. The testimony shows that the defendant company had a verbal agreement with the Denver, South Park & Pacific Railway Company to the effect, *inter alia*, that the defendant should issue no mileage tickets applicable to that portion of its line between Salida and Lead-

ville. The reference on the ticket was to this regulation or verbal agreement. It further appears that, in pursuance of this agreement, Mr. Nims, the general passenger agent of the defendant, had issued orders, both verbally and in writing, to the proper agents and conductors of the company not to sell or receive mileage tickets for that portion of the defendant's road. Mr. Nims testified that when this instruction was in writing, it consisted of a notice written on the bottom of the tariff sheet; stating that the mileage tickets were not good west of Salida. He testified that he made every effort to find one of these tariff sheets by a thorough search at his office and everywhere else, and was unable to find one. This left it entirely proper for the court to admit oral testimony as to the purport of the instruction, which appears to have been, according to the testimony of the conductor Tameny, the simple direction, "Mileage tickets will not be honored by conductors." A like objection taken to the testimony of the witness Sheppard is also untenable, for the reason that it does not appear with any certainty that the instructions given to him as agent of the company were otherwise than verbal.

4. The offer to show by Mr. Eppstein that the defendant company had sold the same kind of a ticket to him about the time of the sale to plaintiff, and that such ticket was used without restriction upon the defendant's road, was properly rejected. The real question at issue was whether the plaintiff was notified, at the time of the purchase of the ticket, that it was not good and would not be received for fare between Salida and Leadville; and the offer to prove that the defendant company had sold a mileage ticket to another party with a different limitation, or with no limitation, or that they had in one or more instances waived the limitation, was not pertinent to the issue. These mileage tickets were issued by the defendant company to large shippers and commercial travelers, and not to the general public. They were at a lower rate

than the regular fare, and issued *ex mera gratia* to parties doing a greater or less amount of business upon their line. With respect to such tickets no question of unjust discrimination can arise.

The foregoing embraces all the points argued by counsel for plaintiff in error, and all the assignments that are regarded as requiring notice. The judgment of the court below is affirmed.

Affirmed.

YATES V. GRANSBURY.

If a judgment debtor having two wagons, one of which he is entitled to exempt from execution, conceals one, and claims the other as exempt, his selection and claim of the other is fraudulent, and a levy thereon by the sheriff is no ground for recovery under the statute (sec. 34, Gen. St. p. 602) making an officer who levies on exempt property liable in three times the value of the property.

Appeal from County Court of Boulder County.

THIS action was brought by the plaintiff to recover three times the value of certain personal property seized by the defendant as deputy-sheriff on execution. Sec. 34, Gen. St. p. 602, is as follows: "If any officer or other person, by virtue of any execution or other process, or by any right of distress, shall take or seize any of the articles of property hereinbefore exempted from levy and sale, such officer or person shall be liable to the party injured for three times the value of the property illegally taken or seized, to be recovered by action of trespass, with costs of suit." Section 32 of the same statute exempts from execution, *inter alia*, "one wagon," the property of a head of a family. Trial to the court, and finding as follows: "That the defendant did, on the 30th day of June, A. D. 1882, unlawfully take possession of a certain wagon belonging to plaintiff, of the value of \$100; and the court orders that judgment be entered herein for \$300, being three times the value of said wagon." Judg-

9	323
18	14
9	323
4a	132

ment against the defendant for \$300, and costs. Appeal. The remaining facts sufficiently appear from the opinion.

Mr. GEORGE ROGERS, for appellant.

Messrs. WRIGHT and GIFFIN, for appellee.

ELBERT, J. The plaintiff Gransbury, at the time of the levy of the execution by the defendant, was the owner of two wagons. The statute exempted but one. He had a right to select which of the two he would retain as exempt from execution; but having selected the one levied upon by the officer, it was his duty, so far as lay in his power, to surrender the other wagon, that the sheriff might levy upon it. *Freem. Ex'ns*, § 212; *Smothers v. Holly*, 47 Ill. 331; *Bonnell v. Bowman*, 53 Ill. 460; *Robinson v. Myers*, 3 Dana, 441; *Keybers v. McComber*, 7 Pac. Rep. 838. There is no doubt, on the testimony, that the effort of the plaintiff, at the time of the levy, was to retain both wagons by concealing the one, and by claiming the other as exempt under the statute. He refused to give the officer any satisfactory information respecting the whereabouts of the wagon not levied upon. He admitted its ownership, and made no claim that it was not within his reach and entirely under his control. The statute was beneficently intended to protect the judgment debtor in the use and enjoyment of certain specified property, not to protect him in a fraud against the judgment creditor. The plaintiff had a right to select and retain one of the wagons as exempt, but he had no right, either directly or indirectly, to select and retain both. Having concealed one, his selection and demand of the other was fraudulent, and the refusal of the officer to regard it affords no ground for recovery under the statute.

The judgment of the court below is reversed.

Reversed.

POLK V. BUTTERFIELD.

1. Upon writ of error, error cannot be assigned on an order made after judgment.
2. It is not necessary that a new promise relied on to avoid the bar of the statute of limitations should be declared on in the complaint. It is sufficient to reply the new promise, after the defense of the statute is interposed.
3. Courts do not take judicial notice of the statutes of other states. They must be set out in the pleadings, and proved like other facts.

Error to District Court of Arapahoe County.

THIS was an action brought by the defendant in error against the plaintiff in error and others on certain bills of exchange. The defendant below pleaded the statute of limitations, and the plaintiff replied a new promise. Trial by the court, and judgment against the defendant in the sum of \$1,480. Afterwards, and at the same term, the defendant Polk interposed a motion, supported by affidavits, to vacate the judgment under the provisions of section 78 of the Amended Code, p. 23. The section, so far as applicable to the case at bar, is as follows: "The court may, on motion, in furtherance of justice, * * * upon such terms as may be just, and upon payment of costs, relieve a party or his legal representatives from a judgment, order or other proceeding taken against him through mistake, inadvertence, surprise or excusable neglect." The motion to vacate the judgment was overruled, and the defendant sued out a writ of error.

Messrs. STALLCUP, LUTHE and SHAFFROTH, for plaintiff in error.

Mr. OWEN MCGARR, for defendant in error.

ELBERT, J. The decision of the district court overruling the motion of the plaintiff in error to vacate the judgment in the court below cannot be reviewed on this

9	325
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11	210
11	400
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17	75
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21	100
9	325
20a	133

writ. At common law no writ of error could be brought but on a judgment or an award in the nature of a judgment. 2 Tidd, Pr. *1141. The whole proceedings to final judgment, inclusive, were entered of record, and the writ went to errors of fact and law appearing in the proceedings as recorded. Steph. Pl. 142. The review was of the record upon which judgment was given. 2 Tidd, Pr. *1134. It appears, also, that the writ would lie to the "execution of a suit" where error was "supposed to be, as well in giving the judgment as in awarding execution thereon;" but in such case the writ ran, "*tam in redditione judicii quam in adjudicatione executionis.*" 2 Tidd, Pr. *1134, *1143. Practically, the writ brought up the entire record. The motion to vacate the judgment in this case is statutory and based on statutory grounds. It was unknown to the common law, and the writ of error had no use respecting it. The act of February 24, 1879, provided for "appeals from" and "writs of error to" the final judgments and decrees of the district and county courts. Sess. Laws 1879, 226, 227. This is the writ of error as known to the common law. The view that, under our practice, it brings up the entire record, and that error can be assigned on an order after judgment, is not admissible. The fact that the act of 1879 repealed the provisions of the code of 1877 respecting appeals to this court, which provided, *inter alia*, for an appeal "from any special order after judgment," makes it difficult to say that the legislature intended, by appeals from *final* judgments and by writs of error to *final* judgments, to still provide for the review of orders *after* judgment by either of the modes prescribed. We are of the opinion that the repeal of the special provision named, without more, precludes us from saying that there was such an intention. This view is strengthened by reference to sections 24 and 25 of the act of 1879, prescribing what may be assigned for error. Orders after judgment are not enumerated.

To the objection that the complaint does not state a cause of action, it is sufficient to say that it was not necessary that the plaintiff should, in the first instance, declare on the new promise. The practice in most of the states is to declare on the original indebtedness, and, if the statute of limitations be interposed, to reply the new promise. Wood, Lim. 201. The effect of the decision in the case of *Buckingham v. Orr*, 6 Colo. 590, is not to exclude such a practice, but to give preference to the practice which declares upon the new promise in the first instance. It may be further answered, upon this point, that the objection to the complaint should have been taken by the defendant by special demurrer. *Buckingham v. Orr*, *supra*.

The objections based upon the provisions of the statutes of Mississippi and Missouri cannot be considered. Courts do not take judicial notice of the statutes of other states. They should have been set out in the pleadings and proved like other facts. 1 Phil. Ev. *624, note 11; Bliss, Code Pl. § 183.

The judgment of the court below must be affirmed.

Affirmed.

ROMINGER V. SQUIRES.

Where the several owners of two irrigating ditches entered into an agreement to construct a new ditch to supersede the old ditches, and, upon the trial of the question what proportion of water carried through the new ditch each one was entitled to, it appeared by the weight of evidence that nothing was said in the agreement about the division of the water, *held*, that the decree of the court adjudging that each party to the agreement was entitled to the same share of the water conveyed through the ditch as he owned of the new ditch itself was erroneous, as being against the weight of evidence. *Held, further*, that the finding of the court that the appropriations of water by the different parties were to be referred to the date of the contract respecting the new ditch, was erroneous, it not appearing that priorities had been waived by the contract respecting the new ditch.

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9	330
9	387
13	114
13	118
13	132
9	387
19	24
9	327
22	522

Appeal from District Court of Saguache County.

Messrs. ARTHUR and VOSBURG, for appellant.

Messrs. E. F. and C. A. ALLEN, for appellee.

ELBERT, J. We have carefully examined and considered the evidence in this case, and are of the opinion that it does not warrant the decree rendered. The three owners of what is called the "Saalfeldt Ditch," and the four owners of what is called the "Wittmayer Ditch," entered into a contract in 1874 to construct what is called the "New Ditch," which was to supersede, either in whole or in part, the two old ditches as a water-way, by means of which their respective lands were to be irrigated. The terms and extent of this contract were the leading questions in the trial below. The court found, in substance, that it was an agreement that each of the parties to the contract (except Zeibig) was to own one-seventh of the ditch, and one-seventh of the water to be conveyed through it. Zeibig, as representing two water-rights in the old ditches, was to have two-sevenths in the new ditch, and two-sevenths of the water. This view of the agreement was the basis of the decree adjusting the rights of the plaintiff and defendant, who held as grantees of parties to the agreement. This finding is undoubtedly correct as to the rights the respective parties were to have in the new *ditch* as a water-way. With respect to the division of water, however, we think it plainly against the weight of evidence. The weight of evidence is to the effect that nothing was said, *in the agreement to construct the new ditch, about the division of the water*; that each party was to bring through the new ditch the water which he claimed to have theretofore appropriated and used in the old ditches; that, while the agreement provided for a change of the water-way, it in nowise contemplated or provided for a change of water-rights. Having reference to their rights in the old

ditches, the evidence shows priority of appropriation on the part of several of the original constructors of the new ditch, and, among others, Saalfeldt, the grantor of the defendant Rominger. Water-rights in this state, where agriculture is almost exclusively carried on by means of irrigation, are valuable properties. In this case the stream from which the water was taken was small, and a scarcity of water therein for the purpose of irrigation was by no means an improbable contingency. It is not reasonable to suppose that priority of right to water, where water is scarce, or likely to become so, will be lightly sacrificed or surrendered by its owner. Nor should the owner of such a right be held to have surrendered it or merged it except upon reasonably clear and satisfactory evidence. The evidence in this case, in our opinion, is not such as to warrant the finding of the court upon this point, in view of the testimony of nearly all the original constructors of the new ditch, to the effect that *nothing whatever was said about the water* in the agreement concerning the new ditch.

The finding of the court that the appropriations of water by the different parties were to be referred to the same date could only have been based upon the proposition that priorities had been waived by the contract respecting the new ditch. The evidence, as before said, shows a prior right, by "diversion and conversion to a beneficial use," in several parties to the contract. The finding of the court upon this point is unsupported.

It follows that the decree, based upon these two erroneous findings, did not properly adjust and determine the respective rights and equities of the plaintiff and defendant in this case. (1) In the view we have taken of the evidence, one-seventh is not the measure of the quantity of water to which each one is entitled. (2) If it be conceded that the water-right of Zeibig, owned by the plaintiff, is of equal date with the water-right of Saalfeldt, owned by the defendant, we think it clear, as

the evidence now stands, that the water-right which the plaintiff claims in connection with the Volk ranch was a later appropriation of water, and must be postponed in favor of defendant's earlier appropriation.

There is nothing in the claim made by counsel for appellee that the plaintiff, Squires, was entitled by reason of five years' adverse possession. There is no such claim set up by the pleadings, nor did the testimony show any adverse possession such as is contemplated by the rule which counsel invoke.

The evidence before us is not sufficiently full and explicit to enable us to direct a decree determining the priorities of the parties, and the amount of water to which each one is entitled, either in this case, or in the case of *Rominger v. Bugh*, which, by agreement, is to be considered and determined upon the same evidence.

The decree of the court below will be reversed, and the cause remanded for a new trial upon the issues made by the pleadings.

Reversed.

ROMINGER V. BUGH.

Appeal from District Court of Saguache County.

Messrs. ARTHUR and VOSBURG, for appellant.

Messrs. E. F. and C. A. ALLEN, for appellee.

ELBERT, J. By agreement of parties this case is heard and determined upon the same evidence as the case of *Rominger v. Squires*, just decided. The same errors exist in this case as in that, and the judgment must be the same. The decree of the court below will be reversed, and the cause remanded for a new trial upon the issues made by the pleadings.

Reversed.

MILLER V. MICKEL.

Where evidence is conflicting in a case tried to the court, and the record discloses that the finding and judgment are not against the weight of evidence, the judgment will not be disturbed.

Appeal from District Court of Summit County.

THIS action is brought by the appellee, Mickel, against the appellant, Miller, the owner and proprietor of the Miners' & Merchants' Bank of Breckenridge, Summit county, Colorado, to recover on a book-account for services rendered by said Mickel, at the instance of Miller, and to recover the balance of a bank account at defendant's bank. There was a direct conflict of evidence, on which the court, sitting without a jury, gave judgment in plaintiff's favor. The only point considered on appeal is the refusal of defendant's counter-claim to be allowed credit against the plaintiff for \$180.53, the amount of an overdraft on an account which plaintiff had opened in the defendant's bank as treasurer of the Sallie Barber Mining Company, which defendant, claiming the right to hold plaintiff personally liable, had transferred from plaintiff's private account to balance the overdraft on the Sallie Barber Mining account. On this point it appears that plaintiff had deposited, as treasurer of the Sallie Barber Mining Company, in the defendant's bank for collection, a draft on a member of said company, with instructions to advise plaintiff if it was not paid on a certain date, after which plaintiff would check against it as treasurer. Defendant, by mistake, sent the draft to New York, instead of Denver, and, receiving no telegram from Denver notifying protest, told plaintiff he was satisfied it would be paid, and plaintiff checked against it for the benefit of his company.

Messrs. BREEZE and BREEZE and T. C. EARLY, for appellant.

Messrs. J. W. HORNER and PETER PALMER, for appellee.

ELBERT, J. This is a case of conflicting evidence. The plaintiff and the defendant were the only witnesses to the principal issues, and contradicted each other with regard to many items of the account sued upon. The court was the judge of their credibility, and an examination of the record discloses no grounds for the reversal of the finding and judgment as being against the weight of evidence.

The chief objection urged here is the refusal of the court below to allow the defendant credit against the plaintiff for the \$180.53 overdraft on the account of the Sallie Barber Mining Company. The checks drawn by the plaintiff against the Sallie Barber Mining Company's account were, without exception, signed by him in his official capacity as treasurer of the company. In addition to this, he distinctly notified the defendant, at the time the account was opened and thereafter, that he was acting as treasurer of the company, and would in nowise be individually responsible on any of the company's transactions, nor for any of its debts. This part of the plaintiff's testimony stands uncontradicted. The defendant, thereafter, could not pay out money on account of the company, and hold the plaintiff responsible therefor. Unless he intended to credit the company, he should have rejected their drafts when there were no funds in his hands to meet them. The mistake whereby the letter intended for Denver was directed to New York, in consequence of which the telegram expected from Denver was not received, was the mistake of the defendant, for which the plaintiff was in nowise responsible, and for the consequences of which he cannot be held to answer.

The court did not err in refusing to allow the overdraft on the account of the mining company as an offset against the individual claim of the plaintiff.

The judgment of the court below is affirmed.

Affirmed.

CLIFFORD v. THE DENVER, SOUTH PARK & PACIFIC
RAILROAD.

1. In actions by employees for injuries arising from the negligence of the employer, such injuries must be the actual, natural and proximate result of the wrong committed, the legitimate sequence of the thing amiss.
2. The injury need not be anticipated in the particular case; it is sufficient if such an injury might be reasonably expected to result in the long run from a series of similar negligences.
3. A complaint averring that the injury resulted from sleeping several consecutive nights at the summit of the Alpine Pass, where snow storms prevailed almost continuously, on wet and frozen ground, with nothing but damp spruce branches for a bed and insufficient covering, held sufficient in the foregoing respects.

Error to District Court of Arapahoe County.

PLAINTIFF was hired as a day-laborer on the construction of defendant's road. His contract provided that defendant should furnish him with "good and suitable board and lodging." The amended complaint contains the following among other averments:

"That some time after plaintiff commenced said work the camp of defendant, which was constructed by said defendant for the purpose of boarding and lodging plaintiff, and the force of hands employed by defendant company in building said wagon road, was moved further westward by said defendant, and further into the mountains on the line of said road, and to a great altitude, where the weather was cold and damp, and where plaintiff, and the whole force of hands and laborers with him,

were greatly exposed, and their health greatly endangered from said exposure; and plaintiff charges and alleges that the defendant company, through its officers, agents and managers aforesaid, wholly neglected and refused to furnish proper shelter or houses, cabins or tents, or the necessary blankets or bedding, to protect plaintiff, and others with him, from the cold, damp and inclement weather of said mountains and said altitude, and especially failed and neglected to provide comfortable beds and bedding to protect plaintiff and his co-employees of nights from cold, damp weather, and from the snows and cold rains then prevailing in said mountains and at said camp.

“That plaintiff and his co-employees, immediately and without delay, protested against such treatment to the said agents and officers and managers of defendant company, and notified them that plaintiff and his co-employees would at once quit work and abandon said employment unless they were immediately, or as soon as possible, furnished with comfortable lodging and protection from such weather, and proper beds and bedding to keep them warm and comfortable at night; and that said officers, agents and managers of the said defendant then and there agreed with plaintiff and his co-employees that if they would not leave and abandon said work, but remain at the same, that defendant, through its said officers, managers and agents, would provide suitable and comfortable lodging and bedding and blankets for them, and that said officers, managers and agents so promised and assured plaintiff and his co-employees, from day to day, for several days; and that plaintiff, relying on such promises and assurances, and believing that the same would be complied with by defendant, did remain in the employment of defendant, as aforesaid, and that during such time, and while plaintiff was relying on such promises and assurances of said defendant, and for two or three consecutive nights, plaintiff was compelled to sleep

on the cold, wet and frozen ground, without anything under him except damp branches of pine or spruce trees, and without sufficient blankets or bedclothes to cover him and protect him from the cold, whereby plaintiff was taken dangerously sick from such exposure, and became wholly paralyzed in his whole body, and in all of his limbs, and became wholly unconscious, and so remained for several months, whereby his whole health was permanently ruined and destroyed for life, and his constitution shattered and so broken down that he has never recovered from the same, and never will.

“The plaintiff received all of said injuries, and has endured all of said sufferings, through the carelessness, neglect, and want of proper care and diligence on the part of said defendant, through its duly-appointed and authorized officers, agents, and managers, as aforesaid, in not exercising due and proper precaution, and in violating their said promises and assurances aforesaid, in regard to furnishing the said plaintiff and his co-employees with proper lodging and beds and bedding to protect him and them from the exposure aforesaid; and plaintiff states that he could not, by any degree of care and diligence on his part, have prevented said exposure and subsequent sickness and suffering, and would have left said employment if he could have done so, and returned back to a settlement or place of shelter immediately; and but for the said promises and assurances of said defendant that proper protection should be furnished without delay.

“That said defendant wrongfully and carelessly moved plaintiff and other laborers from the first camp on the line of said road to the summit of said mountains, on the Alpine Pass, a point of great altitude, and where snowstorms prevailed almost continually, and where, at best, the exposure was very great, and where the health and lives of said men and employees were continually exposed to great danger; and the said officers, agents and

managers of defendant company well knew this, but wholly failed, neglected and refused to prepare such suitable and proper cabins, tents, and bunks and bedding for said new camp, and for the protection of plaintiff and others, before moving into said new camp, which was from twenty-five to thirty miles ahead of the first camp; and that plaintiff did not know of such gross neglect and carelessness until he reached said new camp at the said Alpine Pass, at the summit of said mountains, and was compelled to submit to such exposure for a time, or incur still greater dangers by attempting to return to a settlement or place of shelter; and plaintiff states that it was during the time he was thus compelled to submit to such exposure, as aforesaid, that he was injured in his health, as aforesaid, by the wrong and negligence above alleged."

Demurrer by the defendant, which the court sustained. Plaintiff electing to stand by his complaint, judgment was duly entered dismissing his action. To reverse this judgment the present writ of error was sued out.

Mr. H. B. JOHNSON, for plaintiff in error.

Messrs. TELLER and ORAHOD, for defendant in error.

HELM, J. To sustain the judgment of the district court, counsel for defendant in error urge a single proposition, viz., that the amended complaint does not state facts sufficient to constitute a cause of action. The wording of this complaint might have been better, but we do not deem it fatally obnoxious to the foregoing objection. The action is based upon defendant's negligence, and the rules of pleading applicable did not require a statement of the exact number, quality, weight, and condition of the blankets or other covering provided. The averment that plaintiff "was compelled to sleep on the cold, wet and frozen ground, without anything under him except damp branches of pine or spruce trees, and without sufficient

blankets or bedclothes to cover him, and protect him from the cold, whereby plaintiff was taken dangerously sick from such exposure, * * *” is, in our judgment, the allegation of a material ultimate fact. It is considerably strengthened by other averments of the complaint. But, from the language of this allegation alone, it appears that no bunk or bed of *any kind* was furnished; while under that part of it which relates to covering, evidence of such primary facts as the number and quality of the blankets provided would be admissible.

It was not necessary to allege plaintiff's want of knowledge concerning the kind of weather he encountered at the time of contracting the illness. Under the circumstances disclosed, this became an immaterial matter. There was here no acquiescence in the alleged wrongful omission. When plaintiff reached the camp on Alpine Pass, he, of course, became aware of the condition of the weather. He then, also, for the first time, learned the character of the accommodations furnished. But the complaint shows that immediately upon obtaining this information, he protested, and would have quit work, had not defendant promised to have the supply of beds and bedding at once made sufficient. There was thus a clear admission by defendant that the provision made in this direction was inadequate. But notwithstanding this admission, and defendant's duty in the premises, the promise which induced plaintiff to remain was not kept, nor was anything else done to increase his protection from the dangers naturally incident to the exposure.

But it is asserted that the damages or injuries referred to in the complaint are too remote. We accept the rule on this subject as stated by the authorities cited. The damages suffered must be “the actual, natural and approximate result of the wrong committed.” *Streeter v. Marshall*, 4 Colo. 535. “They must be the legitimate sequence of the thing amiss.” Cooley, Torts, 68.

That sickness and paralysis may actually, naturally

and proximately result, and be a legitimate sequence, from sleeping several consecutive nights at the summit of Alpine Pass, where "snow-storms prevailed almost continuously," on wet and frozen ground, with nothing but damp pine or spruce branches for a bed, and insufficient blankets or other covering, seems to be a reasonable proposition. We certainly cannot, purely as a matter of law, hold the contrary.

Counsel's suggestion that people frequently incur such exposure, and that neither these nor any other serious consequences follow, may be correct. But this fact, if it be a fact, is far from decisive as to the question of liability in cases like the one at bar. The principle above stated does not declare that the damage or injury *must* have resulted, or even that it must have been anticipated, in the particular case under consideration. On the contrary, it has been well said "that the consequences of negligence are almost invariably surprises." The expression "reasonable expectation," frequently used in this connection, is said to mean "an expectation that some such disaster as that under investigation will occur *on the long run* from a series of such negligences as those with which the defendant is charged." Whart. Neg. §§ 77, 78, and cases cited.

The foregoing suggestions answer all of the points specifically made in argument against the complaint by counsel for defendant in error, and we discover no other objection thereto which is fatal. The judgment of the district court is accordingly reversed, and the cause remanded.

Reversed.

PELICAN & DIVES MINING CO. v. SNODGRASS.

1. One who makes a discovery of mineral and runs a tunnel thereon, but does no other act towards completing the statutory location, and for the period of four years does no labor of any kind, acquires no interest in the vein as against intervening rights. Nor can he at the end of the four years perform the remaining acts necessary to a statutory location and have the inception of the claim date from the original discovery, there being intervening rights.
2. The party who first discovers a vein and posts his discovery notice, following such acts with the remaining acts necessary to a valid location within the time prescribed by law, holds the vein as against a subsequent discoverer who succeeds in first completing all the requisite acts of location.
3. The relocater of an abandoned mining claim has the same length of time to perform each of the acts of location subsequent to discovery as the original locator.

Appeal from District Court of Clear Creek County.

DURING the years 1875-76 what is known in the record as the "Ontario Tunnel" was run by one Lewis. The tunnel was about one hundred feet in length, and disclosed a vein of mineral at its breast. The last fifty feet and the vein found were in territory which at the time was unappropriated. About one hundred feet of drifting was also done by Lewis at or near the inner end of the tunnel. He then took no further steps towards perfecting a mining location. Appellee Snodgrass located a claim near the Ontario tunnel, called the "Nadenbusch," and it appears that both Snodgrass and Lewis were under the impression that the Nadenbusch claim covered the apex of the lode disclosed in the tunnel. Snodgrass made his application and secured a patent for the Nadenbusch claim; Lewis failing to oppose the proceeding by adverse proceedings or protest. In February, 1881, Snodgrass went into the drift leading from the Ontario tunnel and did a little work. He also leased the vein existing therein to other parties, but the lease was soon after thrown up. At this time he still believed the apex of the vein to be

covered by the Nadenbusch patent; but upon making surveys with a view to sinking a shaft from the surface down to the drift, he discovered that the apex was outside the Nadenbusch side line, and upon vacant ground. In March following he ran an open cut from the surface, and on the 24th, at the breast thereof, intersected the vein which was shown in the Ontario tunnel. On the same day he posted his discovery notice and staked a claim as the Cross lode. He then sunk a discovery shaft, and June 3d filed his location certificate. He also took peaceable possession of the tunnel, and thereafter placed a door across the same where the vacant territory began, and fifty feet from the entrance. Several days after Snodgrass commenced his open cut, Lewis began sinking a shaft from the surface, and on the day succeeding Snodgrass' discovery of mineral he also reached the vein. He then posted a discovery notice and proceeded to complete his location of the Contention lode. His location certificate was filed prior to that of Snodgrass, but it was dated March 25th, and fixed the date of discovery as December 14, 1876, when he disclosed mineral in the Ontario tunnel, instead of March 25, 1881, when he reached the vein in his shaft. The next day, March 26th, Lewis conveyed by deed to the appellant company. Thereafter the company applied for a patent to the Contention lode. Snodgrass filed an adverse claim and brought this suit in pursuance thereof. Upon trial, verdict and judgment were given for Snodgrass, and the company prosecuted this appeal. The remaining essential facts are sufficiently stated in the opinion.

Messrs. MORRISON and FILLIUS, for appellant.

Mr. LUKE PALMER, for appellee.

HELM, J. The Ontario tunnel was not located in pursuance of the law relating to tunnel-sites. Lewis failed to follow up his discovery of mineral therein with any ef-

fort whatever towards completing the statutory location of a mining claim. With the possible exception of one day's work, he performed no labor in the tunnel for a period of nearly four years, although he sometimes used it as a store-house for mining tools. Under these facts we are of opinion that, as against intervening rights, he acquired no interest whatever in the disputed ground by virtue of the tunnel in question. He could not, four years after discovering the vein in this tunnel, post his discovery notice, erect boundary stakes, file his location certificate, and have the inception of his claim, there being intervening rights, relate back to December 14, 1876, the date of such discovery.

The negotiations of Snodgrass with either Lewis or Seddon for the privilege of using the Ontario tunnel in working the Nadenbusch, a patented mine belonging to Snodgrass, are matters of no consequence in this litigation.

Neither does the mistake, which seems to have been mutual on the part of Snodgrass and Lewis, in supposing that the apex of the vein disclosed in the Ontario tunnel was covered by the Nadenbusch patent, affect the case.

We do not agree with counsel for appellant in their position that it was the duty of Snodgrass, upon discovering this mistake, to inform Lewis, and give him an opportunity to first locate the ground in controversy. As suggested by counsel for appellee, under the evidence there is no more reason for holding that Snodgrass was estopped from locating the Cross lode without notice to Lewis, than there would be for saying that, had Lewis first ascertained the mutual mistake, it would have been his duty to inform Snodgrass, and give the latter precedence in securing the coveted vein. We therefore discard the Ontario tunnel, and the other matters connected therewith, above mentioned, from further consideration in the case.

Snodgrass first disclosed a vein of mineral upon the ground in controversy by excavating from the surface.

He immediately posted his discovery notice, marked the boundaries, and, in the course of seven or eight days, completed his discovery shaft. Within three months from the date of discovery he filed his location certificate for record in the proper office. It is true that Lewis completed his discovery shaft, and recorded his location certificate, at earlier dates than did Snodgrass. But these acts did not overcome the advantage obtained by Snodgrass through his prior discovery.

It is earnestly argued by counsel for appellant that the claim of Snodgrass was a relocation, and that the statute fixing sixty days and three months for sinking the discovery shaft and filing the location certificate, respectively, did not apply to the same. The learned counsel insist that these acts, in connection with relocations, must be performed within a reasonable time; and that, under the circumstances disclosed in this case, seventy days, the period existing between Snodgrass' discovery and the filing of his certificate for record, was not a reasonable time. In response to the foregoing argument, we have this to say: that, in the *first* place, there never having been a location of the ground in controversy, it cannot be treated as an abandoned claim; hence the location of Snodgrass should be regarded as an original and not a relocation. But, *secondly*, counsel are mistaken in their view of the law regarding relocations. Construing the relocation provision in connection with the other location statutes, we are satisfied that the legislature intended to place the original discoverer and the relocater, so far as possible, upon precisely the same footing. That body doubtless desired to give the latter sixty days, after finding the vein (technically, perhaps, there could not be a second *discovery* thereof) and erecting his "new location stake," to sink a discovery shaft, and three months within which to record his certificate. Such is the construction of the law already announced by this court. *Armstrong v. Lower*, 6 Colo. 393.

It follows from the foregoing conclusions concerning the facts and the law, that the rights of Snodgrass, by virtue of his location of the ground in controversy, must be held superior to those of appellant acquired through the attempted location of Lewis. It is not necessary for us to separately discuss the specific assignments of error, as the questions presented thereon by appellant have been fully answered.

The judgment will be affirmed.

Affirmed.

CONSOLIDATED REPUBLICAN MOUNTAIN MIN. CO. v. LEB-
ANON MIN. CO.

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1. One acting as the agent of another in perfecting title to a mining lode, who paid no part of the purchase price, owned no individual interest, and conveyed with no covenant of warranty, is not estopped, after his agency ceased, from conveying any other or different title which he thereafter acquired to the premises in controversy.
2. In 1865 the manner of locating lode claims in Griffith mining district, Colorado, was governed by miners' rules and customs; and, to locate and hold a claim, development work, after posting the discovery notice, was requisite.

Appeal from District Court of Clear Creek County.

Messrs. MORRISON and FILLIUS and L. C. ROCKWELL,
for appellant.

Messrs. HUGH BUTLER and JOHN A. COULTER, for ap-
pellee.

HELM, J. Brown acted as the agent of the Lebanon Company in perfecting title to the Powell lode. He paid no part of the purchase price, owned no individual interest, and conveyed with no covenant of warranty. He appears to have discharged his duties in perfect good

faith. Therefore he was not estopped, after his agency ceased, from conveying to the Republican Company any other or different title which he thereafter acquired to the premises in controversy as a part of conflicting claims.

The so-called "Powell location," upon which appellee relies, was made in July, 1865. The Dryden and Rocky Mountain Mammoth locations, through which appellant claims, were made in September of the same year. The Powell was located simply by posting a notice and recording a certificate. No work of any kind whatever was done thereon at the time of posting the notice, or, so far as the record discloses, for at least six years thereafter. A shaft from two to three feet deep was sunk upon the Dryden, and one from eight to ten feet deep upon the Rocky Mountain lode, in the month of September, when their respective notices were posted and certificates filed for record. During the same fall the depth of the Dryden shaft was increased to six or seven feet.

In 1865 the manner of locating lode claims in Colorado was governed by miners' rules and customs; and, in order to constitute a valid location, compliance therewith was necessary. *Sullivan v. Hense*, 2 Colo. 424.

No objection was made or exception reserved, at the trial, by either party, to the method of proving these rules or customs. Two witnesses testify that no work was then required, either to locate or to hold a claim; but one of them says, "As a general thing, we sunk a hole on every lode we recorded." Three witnesses swear that, under the prevailing customs, it was necessary (one says within thirty, another within sixty, days after discovery) to do some work in order to hold the lode.

Mr. Justice Field, speaking the unanimous view of the supreme court of the United States in *Jennison v. Kirk*, 98 U. S. 453, with reference to these miners' regulations and customs in California, uses the following language:

"They all recognized discovery, followed by appropriation, as the foundation of the discoverer's title, and development by working as the condition of its retention." We think this remark equally true of the rules and customs existing in Colorado prior to statutory enactment on the subject. It is hardly possible that a custom ever prevailed with miners which recognized the right to possession of a lode or lode claim, for an indefinite period, without actual occupancy or some kind of development work. To say that merely posting a discovery notice on the crevice, and recording a certificate stating metes and bounds, constituted such an appropriation as, for a considerable period, prevented another from taking possession and developing the lode, is to recognize a custom that can hardly be considered reasonable,—a custom contrary to the usual experience and practice in appropriations of the public domain and incompatible with ordinary sagacity and appreciation of justice among miners themselves.

The statute of 1861 relating to lode claims, which was still in force, in effect recognizes the fact that development work was required by the existing customs, for section 11 thereof protects the locations of soldiers in the army from forfeiture, because not "represented" (*i. e.*, occupied or developed), till the expiration of nine months after the date of their discharge from the service.

We are of the opinion that in 1865, to locate and hold a mining claim in Griffith mining district, development work after posting the discovery notice was requisite. No annual labor was required by statute for a number of years subsequent to that date, and we are not apprised by the record that an abandonment of either the Dryden or Rocky Mountain lodes at any time took place.

It is unnecessary to indulge in a further consideration of the points presented. The judgment of the district court will be reversed and the cause remanded.

Reversed.

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13	237
18	242
9	346
16	385

G. B. & L. R'Y CO. v. HAGGART ET AL.

1. In proceedings to condemn a right of way for a railroad the title of one named in the petition as respondent to the land sought to be taken is admitted unless it is expressly denied, and the averment by respondent of title to property not covered by the petition will entitle him to damages in respect thereto, if such averment is not denied.
2. Eight hundred dollars held not an excessive award against a railroad company for taking a strip of land, about nine hundred feet in length, across two patented mill-sites, and a right of way over a lode claim.

Appeal from County Court of Clear Creek County.

CONDEMNATION proceedings.

Messrs. TELLER and ORAHOD, for appellant.

Mr. W. T. HUGHES, for appellees.

HELM, J. Petitioner sought to condemn, for the use of its railway, a strip of land about nine hundred feet in length, across two patented mill-sites; also the right of way over a certain lode claim. Its line touched the stream upon which the mill-sites are located, and, according to the evidence, its embankment would materially increase the expense of constructing dams necessary to operate machinery thereon. In view of these facts, we are not prepared to say that \$800 was an excessive award for the land actually taken, and the damages inflicted upon the remaining property.

The foregoing conclusion disposes of one proposition argued by counsel for appellant, leaving but a single question to be considered, viz., did the court err in refusing to charge the jury that, unless they found the title to a certain tunnel in respondents, they should assess no damages for injuries thereto?

Respondents Teal and Foster were made parties on motion of petitioner. In their answer filed, they first disclaimed any interest in the mill-sites, and then admitted ownership of half the lode described by the peti-

tion. They also averred title to one-half of a certain tunnel and other workings. From the pleadings and evidence we may justly infer that the tunnel and workings mentioned were simply improvements upon the lode location described. In such case, injuries to them might be regarded as injuries to the realty. The jury either took this view, or they awarded nothing on account of interference with the usefulness of the tunnel; for, while the verdict itemizes the damages, and separately specifies the respective amounts allowed, it contains no reference to the tunnel. If the jury allowed nothing for interference with work upon the claim by means of the tunnel, the error, if error there were, in refusing the instruction, was without prejudice, and appellant cannot complain. If, on the other hand, the jury considered the inconvenience and extra expense occasioned by the railroad embankment, in prosecuting development through the tunnel, when estimating \$100 as "damages resulting to the remainder of the lode claim," no error was committed; for the claim was described in the petition, and a right of way over the same was therein demanded.

We are of the opinion that when one files his petition naming a respondent, and seeking the condemnation of certain specified property, the petitioner thereby, in the absence of special averment to the contrary, admits such title in the respondent named as authorizes the assessment of full compensation for the taking of the premises described, or the injury thereto.

There is no doubt but that the question of ownership may become an issue in these proceedings. Such issue, however, must be properly presented by the pleadings. Respondents' averment of title to the tunnel was not denied, and for this reason also, even were the tunnel regarded as property not covered by the petition, we should hold that the court did not err in refusing the instruction asked. The judgment is affirmed.

Affirmed.

KASSON V. FOLLETT.

An appeal to a district court is rightly dismissed for failure of the appellant to cause a transcript of the proceedings below to be filed in the district court within the time required by a rule of the said court, notwithstanding that the statute authorizing the appeal prescribes no time within which the transcript shall be transmitted to the appellate court.

Error to District Court of Chaffee County.

MESSRS. McDONALD and NORRIS, for plaintiff in error.

MR. J. B. BISSELL, for defendant in error.

BECK, C. J. This action was originally instituted in the county court of Chaffee county, by Follett, the defendant in error, who obtained judgment therein against Kasson, the plaintiff in error. The latter prayed an appeal to the district court, and perfected the same by the filing of an appeal bond. The appeal was afterwards dismissed for failure of Kasson to cause a transcript of the proceedings below to be filed in the district court within twenty days after the perfection of his appeal, as was required by rule 12 of said court. This action of the district court is assigned for error, and, in support of the assignment, we are referred to the case of *Swenson v. Girard F. & M. Ins. Co.* 4 Colo. 475, wherein the court say that the making of a transcript of the record, and transmitting it, with the necessary papers, to the appellate court, is a ministerial duty to be performed by the proper officers of the court appealed from, and that any delay or default in the discharge of such duty ought not to work injury to an appellant who has filed the requisite appeal bond.

The statute referred to, which authorized an appeal from the county to the district courts, prescribed no time within which a transcript of the record should be transmitted to the appellate court. In order, therefore, that

parties interested in cases legally pending in a district court might not be hindered in the determination of their rights, by appeals taken merely for delay, it was entirely proper for the district judge to require, by a standing rule of court, parties appealing from judgments to the county court to lodge the papers and record on appeal in the appellate court within a reasonable time after the perfection of their appeals. Upon this point we said, in *Cates v. Mack*, 6 Colo. 405: "This duty devolves upon the officers of the inferior court; but, if they neglect it, the appellant should take steps to have the papers sent up, either by applying to the appellate court for a rule to that effect, as suggested in *Little v. Smith*, 4 Scam. 402, or otherwise, as may be prescribed by the appellate court."

We think twenty days was a reasonable time, in the present case, to procure and file in the district court the transcript of the proceedings had below; and, in the absence of a showing by the appellant that he made any effort to comply with the rule of the district court, the judgment must be affirmed.

Affirmed.

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KENDALL ET AL. V. SAN JUAN SILVER MIN. CO.

1. Where pleadings are contradictory, and the issues are narrowed by a stipulation to issues of facts of which the court can take judicial notice, it is proper for the court to decide the case upon a motion for judgment upon the pleadings and stipulation, and it is unnecessary to assign the case for trial. The facts left in issue, being facts of which the court could take judicial notice, are deemed part of the pleadings, and not matter for evidence.
2. A mining location made tortiously upon an Indian reservation before the Indian title is extinguished will not avail against a location made after the land is opened for settlement.

Appeal from District Court of San Juan County.

It appears from the record that about the month of October, 1880, the appellee made its application in the United States land office in Lake City, Colorado, for patent to the Titusville lode claim, situated in San Juan county, and that the appellants, on the 23d of October, 1880, filed in said office their adverse claim, alleging that a certain portion of the premises sought to be patented by the appellee was covered by the Bear lode claim, a prior location owned by the appellants. The present action was afterwards instituted by the appellants in the district court of San Juan county, in support of their adverse claim.

The complaint avers the location of the Bear lode by the appellants on the 3d day of September, 1872, by the sinking of a discovery shaft, the discovery of mineral, and the due performance of all the various acts necessary to perfect a mining location under the congressional and statutory laws and the local rules and customs; also that the claim was then open to entry as mineral land, and was unoccupied and unclaimed by any person. The performance of annual labor, and all other acts necessary to preserve said Bear lode from forfeiture, are likewise averred. The complaint states, further, that the Bear lode claim, as originally located, extended one thousand five hundred feet in length, and one hundred feet in width, on each side of the center of the vein, and so remained until the 14th day of October, 1878, when the owners filed an additional certificate of locations in the office of the recorder of San Juan county, claiming one hundred and fifty feet on each side of the center of the vein. It alleges that the Titusville lode is a junior location, and includes within its boundaries a portion of the territory embraced in the Bear location. From the description given in the pleadings of the portions of said claims which are in conflict, it appears that the Titusville location includes one thousand two hundred feet in length of the Bear surface ground, and in width covers

more than the south half of said surface ground for said entire one thousand two hundred feet. The plaintiffs further allege that they have expended the sum of \$150 in the preparation and filing of their adverse claim, and they pray judgment for the possession of the premises, for the recovery of said sum of \$150, and for costs of suit.

The appellee's answer denies all the material allegations of the complaint, and denies that the ground in controversy comprised a part of the unappropriated public domain of the United States, and that it was open to location on the 3d day of September, 1872. It alleges that at that date it comprised a portion of a certain tract of land, which, by treaty between the United States and certain confederated bands of Ute Indians, in Colorado, duly approved, and afterwards, on November 6, 1868, duly proclaimed by the president of the United States, had been set apart to the use and occupation of said Indians, and that the Indian title to said tract of land was not extinguished until March, 1874. The answer further alleges that, if plaintiffs were entitled to make a location on said tract of land at the date mentioned, they were not entitled to a location exceeding fifty feet in width. And, for further answer and cross-complaint, the appellee alleges the location of the Titusville lode claim on the 29th day of August, 1874, together with the existence of all conditions and the performance of all acts necessary to constitute a valid location of the vein and territory described in the location certificate, including the premises in controversy, and prays judgment for the possession thereof, and for costs.

To this pleading of the appellee the appellants filed a replication, traversing all its material allegations, and denying, among other things, that, at the date of the appellants' location, the ground in controversy comprised a portion of the Ute Indian reservation, and that at the date of the appellee's location the ground in dispute was part and parcel of the unappropriated public domain.

Subsequently, a stipulation, signed by the attorneys of the contesting parties, was filed in the cause, conceding the truth of the allegations of the respective pleadings, and that both parties had complied with all the requirements of the law in respect to the location and development of their said claims, as set forth in their pleadings, save only the allegations that, at the time of their respective locations, the ground in controversy was a part of the unappropriated public domain open to location; and excepting, further, the right of the appellants, if entitled to locate a claim at all on said tract of land on the 3d day of September, 1872, to locate a claim of a greater width than fifty feet.

The next step in the cause was the filing of a motion, by the appellee, for judgment upon the pleadings, the stipulation of facts, and a disclaimer of the appellee filed upon the hearing of said motion. In the latter document the defendant disclaimed all right or title to that portion of the premises in controversy which comprised the center fifty feet, or twenty-five feet on either side of the center line, of the Bear lode location. Upon the hearing of this motion it was sustained by the court, and the action of the appellants dismissed. Judgment was also entered in favor of the appellee for the premises then remaining in controversy between the parties, and for the costs of suit; to all of which rulings the appellants duly excepted.

Messrs. C. H. TOLL and HENRY FORD, for appellants.

Messrs. M. B. CARPENTER and HUDSON and SLAYMAKER, for appellee.

BECK, C. J. The appellants assigned for error the allowance of the motion for judgment on the pleadings, stipulation of facts and disclaimer; also that the court erred in rendering judgment in favor of the appellee. The grounds of error alleged are that the stipulation of facts and the disclaimer were not instruments in the

nature of pleadings, but matters only cognizable as evidence; hence that they could not be properly considered upon a motion, but only on a trial of the issues joined.

We are of the opinion that this proposition is unsound. One of the most important objects of the present system of pleading is to compel the parties to make their issues cover the real facts in dispute, so that neither party shall be subjected to the trouble and expense of proving what is not in fact disputed. It requires that the real matter in controversy shall be brought clearly before the court, and that the precise points, both of fact and of law, involved, shall be disclosed before the trial is entered upon. Another advantage claimed is that it may be known, from an inspection of the respective statements of the parties, whether, if duly proven, they warrant any relief upon the complaint or cross-complaint, and whether there be a legal defense to the action. It is true, by the original pleadings in this case, the objects sought to be attained by the code provisions were defeated; for the pleadings of each party denied every allegation of the other, regardless of truth, with one or two immaterial exceptions. But the filing of the stipulation of facts operated as a waiver of the numerous traverses, and narrowed the issues to three questions of law and fact. These questions were: *First*. Was the territory in dispute open to location as mineral land, under the laws of the United States, on the 3d day of September, 1872? *Second*. If it was open to location at that date, were the plaintiffs then entitled, under the law, to locate a claim exceeding fifty feet in width? *Third*. Were the premises on the 29th day of August, 1874, when the defendant's location was made, a part of the unappropriated public domain, open to location as mineral land?

The position assumed by appellants' counsel is that the issues were not modified by the filing of these papers, but remained for trial as originally framed; that the

court could not take judicial notice of instruments or papers of this character, waiving legal rights, although executed by the parties themselves, and duly filed in the cause, but that the issues thus attempted to be waived should have been disposed of on trial of the cause, by producing the said stipulations in evidence. The fallacy of these propositions is apparent. The filing of the stipulation and disclaimer wholly withdrew the matters therein mentioned, as being conceded or waived, from the consideration of the trial court. These matters were no longer in the case. Thereafter all the allegations concerning the location of the Bear and Titusville lode claims, the dates of locations, the expenditures made, the work done, and the various acts performed in compliance with the mining laws, and with the local rules and regulations, stood untraversed. There remained no issues for trial requiring the production of evidence; and it would have been an idle ceremony to have impaneled a jury to witness the disposition of the case by the presiding judge upon considerations of law and fact whereof he was bound to take judicial notice.

It is true the complaint alleged that at the date of the location of the Bear lode, September 3, 1872, the premises in controversy were unoccupied and unclaimed mineral lands of the public domain; that the answer alleged that the premises, at that time, comprised a part of a certain tract of land set apart as a reservation for the confederated bands of the Ute Indian Nation by virtue of a treaty made and concluded between the United States and said Indian tribes, duly accepted and ratified and confirmed by a proclamation of the president of the United States issued on the 6th day of November, 1868; that the Indian title to said reservation, including the premises in controversy, was not extinguished until the month of March, 1874; and that on the 29th day of August, 1874, the date of the appellee's location of the premises in controversy as part of the Titusville lode

claim, the same was then a part of the unoccupied and unappropriated mineral domain of the United States; also that the replication denied these averments of the answer. It is likewise true that the issuable facts just mentioned were not in any manner affected by the making and filing of the stipulations. But all the facts involved in these issues were of that character, the existence of which courts are bound to take judicial cognizance. The ultimate rights of the parties, therefore, depended upon judicial conclusions to be drawn from a consideration of all truthful allegations of fact, whether traversed or untraversed, in connection with the implied propositions of law necessarily arising out of these several propositions of fact.

For example, although the plaintiffs, in the location of the Bear lode, performed every act necessary to constitute a valid location of a mining claim, yet, if the territory upon which these acts were performed did not comprise a portion of the unappropriated public domain open to location as mineral land, the work done and expenditures made secured no rights to the locators thereof. The question of right depends upon the truth of the allegations concerning the existence, date, boundaries, and terms of the original treaty with the Indians, and the truth of the allegations concerning the alleged relinquishment of the Indian title to that portion thereof which includes the premises in controversy, considered with reference to the law arising upon such facts. As before stated, these were matters concerning which the courts take judicial notice. The treaties mentioned were incorporated, with the laws enacted by congress, in the Statutes at Large of the United States. See St. at Large U. S. 1868, tit. "Treaties," p. 119; also 18 St. at Large, pt. 3, p. 36. The accepted doctrine is that the constitution and laws of the United States, and all treaties made under the authority of the United States, constitute the supreme laws of the land; and the judges in every state

are bound thereby, and will take judicial notice of their provisions. Article 6, § 2, Const. U. S.; 1 Greenl. Ev. §§ 5, 490; Bliss, Code Pl. § 185. Courts also take judicial cognizance of the civil divisions within a state; of counties, townships and towns; and of the existence and general location of places referred to in the pleadings, and, if within the jurisdiction of the court, the county to which they belong. Bliss, Code Pl. §§ 186-189. Exercising such cognizance, the court had judicial knowledge that the contested facts were as alleged in the defendant's answer; that is to say, at the time of the plaintiffs' location of the Bear lode claim the ground claimed was within the Indian reservation, but that the Indian title thereto had been extinguished prior to the location of the Titusville lode by the defendant. All propositions of fact bearing upon the case were therefore legitimately before the court on the motion for judgment, and it only remained for the court to construe the propositions of law arising thereon in order to pronounce judgment. The real issues, then, or questions to be decided, being purely legal, it was unnecessary to assign the cause for trial, and they were properly decided on the defendant's motion for judgment.

Was the plaintiff entitled to judgment for any portion of the premises in controversy? It is clear that, unless a valid location of a mining claim can be made upon territory while it constitutes part of a reservation set apart by treaty for the exclusive use of an Indian nation, the plaintiff acquired no rights whatever by his location of September 3, 1872; and this is the only location asserted by him.

By the treaty proclaimed November 6, 1868, the United States solemnly agreed that the district of country therein described "shall be and the same is hereby set apart for the absolute and undisturbed use and occupation of the Indians herein named; * * * and the United States now solemnly agree that no persons except those herein

authorized so to do, and except such officers, agents and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, except as in this article herein otherwise provided." There is no provision excepting any part of the territory included within the bounds of the reservation for occupation or location for agricultural or mining purposes by white persons.

It has been decided by the supreme court of the United States that, in the prosecution of an adverse claim to a mineral location, the plaintiff must show such a location as entitles him to possession of the ground claimed as against the United States, as well as against the other claimant; that if it is not valid as against the one, it is not as against the other; and that he must establish a possessory title in himself, good as against everybody. *Gwillim v. Donnelan*, 115 U. S. 45.

The effect of the treaty was to withdraw the whole of the land embraced within the reservation from private entry or appropriation, and during its existence the government could not have authorized the plaintiffs to enter upon the ground in controversy for the purposes of discovering and locating a mining claim. On the contrary, the government stood pledged to prevent its citizens from entering upon the reservation for any such purposes. The right to locate mineral lands of the United States is declared to be a privilege granted by congress. No such grant including the premises in controversy existed at the time of the plaintiffs' location. It is also held that a location, to be effective, must be good at the time it was made, and that it cannot be good when made if there is then an outstanding grant of the exclusive right of possession to another. The possession of the plaintiffs at the time of their location of the Bear lode was tortious. Such being the character of their possession, and assum-

ing to locate a claim not only without legal authority, but in violation of law, the attempted location was a nullity. It was just as if it had never been made. *United States v. Carpenter*, 111 U. S. 347; *Belk v. Meagher*, 104 U. S. 279.

The foregoing objections do not attach to the defendant's location of the Titusville lode. This location, made after the Indian title was extinguished, was conceded to be regular in all respects, save as to the defendant's allegation that the premises comprised a part of the unappropriated public domain open to location as mineral land. This allegation was traversed merely, the only effect of which was to assert priority of appropriation by the plaintiffs. The plaintiffs' claims having failed, the judgment of the court was correct. Judgment affirmed.

Affirmed.

9	358
25	252
9	358
18a	110

SWEM V. GREEN.

1. Where an appellant tenders his bill of exceptions to the judge within the time limited by the order of the court for its preparation, it is a sufficient compliance with the order, although the judge does not sign it within the specified time.
2. The file-mark on a bill of exceptions, showing the date of its presentation to the judge, is a part of the record.
3. Where goods deposited with a warehouseman were stolen, and the depositor demanded payment for them from him, and he finally agreed to pay a less sum than that claimed, in settlement, but paid only a part of it, and suit was brought for the balance, *held*, that it was immaterial to the issue that he was not originally liable as warehouseman, the suit being brought upon the compromise agreement.
4. A compromise of a doubtful right is sufficient foundation for an agreement, and it is no defense to say that it was without consideration.

Appeal from County Court of Arapahoe County.

THE appellee, Jennie Green, who was plaintiff below, caused to be deposited with the appellant, who was a

warehouseman, a box containing various articles of clothing and household goods. While the box remained in appellant's custody his warehouse was entered by thieves, and the box rifled of its contents. Mrs. Green demanded of the appellant, as payment for the loss of her goods, the sum of \$250, which she testifies was their value. After considerable negotiation and delay, according to the preponderance of the testimony, the appellant agreed to pay her, in settlement of the claim, the sum of \$168, which she agreed to accept. He paid her small sums, at different dates, amounting in the aggregate to the sum of \$60; and, after frequent demands for the payment of the balance of the sum agreed upon, the appellee brought suit before a justice of the peace, demanding judgment for the sum of \$100. Judgment for the amount of the demand was awarded her by the justice, and afterwards by the county court, on an appeal from the justice's judgment.

Prior to the entry of the judgment in the county court the defendant moved for a new trial, which was overruled, the court assigning in writing the following reasons therefor: "*First*, the court found from the testimony that a settlement had been arrived at between the parties, there being a dispute between them as to whether defendant was liable, and, upon defendant's promise to pay in pursuance of such settlement, found for the plaintiff; and, *second*, the settlement having been made in this way, the court did hold that in this suit it was immaterial whether or not the defendant had been guilty of negligence by which the goods were lost, holding that the settlement by the parties of the dispute between them as to the defendant's liability for the loss was a sufficient consideration for the defendant's promise to pay for the goods a sum much less than plaintiff claimed to be their value."

The appellant testified that plaintiff came to his office for her goods, and that her box had been robbed just be-

fore her visit. That she called again and presented him an itemized account of the lost goods, amounting in value to the sum of \$185.45; that he never admitted his liability, either to the plaintiff or any one else, to pay anything on account of said loss, but contended from first to last that he was not legally responsible. He said he had employed a man at night to guard the warehouse; that he had taken as good care of the plaintiff's property as of his own; and that he was not liable, under the law, to pay her anything. He had told the plaintiff, however, that if he succeeded in collecting a certain claim against the railroad company he would pay her something as a present. He also admitted that he had paid her \$50 or \$60. He also admitted that he had been frequently pressed for payment of the claim, both by plaintiff and by her attorneys.

Respecting the compromise agreement so stoutly denied by the appellant on the trial below, the testimony of Mrs. Green is fully corroborated by her attorney, E. B. Sleeth, Esq., who testified that it was made in his office and in his presence.

Mr. J. W. HORNER, for appellant.

Mr. O. B. LIDDELL, for appellee.

BECK, C. J. Preliminary to the consideration of this case upon the errors assigned, we will pass upon a motion to strike the bill of exceptions from the files, which was reserved until the case should be reached for final consideration. Upon looking into the motion, we are of opinion that the ground thereof is not well assigned. It is that the bill of exceptions was not filed within the time prescribed by the court below. The order of the court was that the appellant have "*fifty days in which to prepare his bill of exceptions.*" To comply with this order, it was only necessary, under the adjudications upon this subject, for the appellant to prepare his bill of

exceptions, and tender it to the judge within the fifty days. This duty the appellant performed, but the judge did not sign the bill for several months afterwards. This brings the case within the rule laid down in *City of Denver v. Capelli*, 3 Colo. 236. It was there held that when a party has tendered his bill of exceptions to the judge in apt time, under the order of the court, he has so far complied with the rule as not to be prejudiced by the failure of the judge to actually sign it within the time prescribed. That this bill was presented in apt time is shown by the indorsement or file-mark of the judge thereon, over his official signature, thus: "Presented for signature," etc., "this 3d day of June, A. D. 1882. BENJ. F. HARRINGTON, County Judge."

But counsel for appellee affirm that this filing is no part of the bill of exceptions, and consequently no part of the record; hence that this court cannot notice the same. This bill, certified and signed by the judge, and bearing the aforesaid file-mark thereon, was filed among the papers of the case in the office of the clerk of the court below, and thus became a part of the record. This record, with its indorsements, is now regularly before us by transcript; and while the file-mark in question is not, strictly speaking, a part of the bill of exceptions, yet it performs one of the purposes that a file-mark indorsed on any other law paper performs, viz., it shows the date of its presentation to the proper officer, and necessarily becomes a part of the record. It is an official certificate of the above fact, and therefore competent evidence that the bill was tendered for the signature of the judge within the time allowed.

It has been held that evidence on this point furnished by the record will be considered by appellate courts; also that, in a case where the judge has signed the bill of exceptions, in the absence of evidence that it was not presented in the time prescribed, it will be presumed that it was done in apt time, in furtherance of the principle that

where a party has complied with the rule of court, so far as it was in his power to do so, he is not to be prejudiced because the judge did not sign the bill until after the time fixed has expired.

In *Underwood v. Hossack*, 40 Ill. 98, three days were allowed within which the plaintiff in error might file his bill of exceptions. It was not actually filed within that period, and there was nothing to show when it was presented to the judge. The court said: "The judge having signed this bill of exceptions, we will presume that he would not have done so unless it had been presented to him in proper time."

In affirming the above principle, the same court in *Village of Hyde Park v. Dunham*, 85 Ill. 569, said: "If the bill of exceptions was in fact made or filed under circumstances not authorized by law, motion should have been made in the court below to strike it out of the record; and, that not having been done, we cannot do otherwise than regard it as rightfully a part of the record."

When a judge certified that a bill was not presented to him in proper time, it was held to have been properly stricken out. *Magill v. Brown*, 98 Ill. 235.

It follows, from the foregoing adjudications, that if it appears affirmatively from the certificate or indorsement of the judge, as in this case, that the bill was presented within the time prescribed, it properly constitutes a part of the record, although not actually signed until some time afterwards. The motion to strike out must be denied.

Referring, now, to the errors assigned to the findings and judgment of the court below, we observe that one of the points raised and discussed by appellant's counsel is that appellant was not originally liable under the law, as a warehouseman, for the loss of the goods; the evidence produced in the trial having shown that he was not guilty of any negligence in connection therewith. It is only necessary to say, in answer to this proposition, that

the action is not based on the original liability of the appellant, but upon the alleged compromise agreement, whereby he promised the appellee to pay her a certain sum of money, less than the real value of the goods stolen, in liquidation of her claim.

The first assignment of error alleges that the appellant made no promise to pay for the loss sustained by the appellee, and that, if he did, it was a promise without consideration, and therefore not binding. The decided preponderance of the evidence is to the effect that appellant promised to pay the appellee \$168 in liquidation of her claim, which was \$250. It is no excuse for failing to comply with this promise, to say that it was made without consideration. Where a claim of this nature is settled by the parties, the validity of the agreement does not depend upon the question whether there was, in fact, an original liability to pay for the loss or not. It is not necessary, in the compromise of a doubtful right, that the parties have settled the controversy as the law would have done. *Fisher v. May's Heirs*, 2 Bibb, 448. It is a well-settled principle of law that the compromise of a doubtful right, though it afterwards turns out that the right is on the other side, where the parties act in good faith, and with a full knowledge of the facts, is valid and binding. The cases announcing this doctrine generally quote approvingly the terse and logical remarks of Lord Hardwicke upon the subject, made in *Stapilton v. Stapilton*, 1 Atk. 10, to wit: "An agreement entered into upon a supposition of a right, or of a doubtful right, though it afterwards comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties; for the right must always be on one side or the other; and therefore the compromise of a doubtful right is a sufficient foundation of an agreement." *Honeyman v. Jarvis*, 79 Ill. 322; *Mill's Heirs v. Lee*, 6 T. B. Mon. 97. It is held in *Curry v. Davis*, 44 Ala. 281, that where a creditor and

his debtor entertain doubts of the validity of the debt, and make an honest compromise of it, a note given by the debtor for the compromise sum agreed upon cannot be contested as lacking consideration. And in *Scott v. Warner*, 2 Lans. 49, it was said that, if a disputed claim for damages be compromised, the settlement is a sufficient consideration for the note given thereon.

In another assignment counsel for appellant argues that the court below erred in finding that there was a *dispute* between the parties concerning the liability of the defendant, and that the settlement of this dispute was a consideration for the promise. It is true, according to the testimony of the appellee and her witnesses, the appellant never disputed his liability to pay for the goods lost. It is equally true, according to the testimony of appellant, that he never *admitted* his liability, but contended from first to last that he was not legally responsible. To hold that there was no dispute between the parties concerning the liability of the appellant, we must reject his statements as unworthy of belief. The testimony of both parties, however, shows that the appellee and her attorneys were insisting upon payment; that she made out an itemized account, amounting to more than the amount finally agreed upon, and presented it to the appellant for payment. It is not important whether the appellant disputed the claim or not. If his testimony that he did dispute it is not true, he may have thought himself liable, or he may have entertained doubts as to his liability, or he may have made the promise to avoid litigation; but whatever his motive may have been, since the testimony shows that he agreed to pay a portion of the claim, and that the appellee agreed to accept such portion in satisfaction of the whole demand, and since the appellant afterwards made sundry payments on account of the claim, he was justly held liable to pay the balance of the amount agreed upon. Judgment affirmed.

Affirmed.

BAILEY ET AL. V. JOHNSON, SHERIFF, ETC.

A voluntary transfer by a debtor to one of his creditors of certain horses and mules and wagons used by him at his saw-mill, in trust to sell the same, and to apply the proceeds in payment of certain preferred creditors, the balance being accepted by the assignee in settlement of his own claim, is not void as to other creditors under the statute (Gen. St. § 1523), where a bill of sale of the property was executed by the debtor, and delivered to the assignee, and formal possession of the property surrendered to him one day, and the property removed by the assignee from the mill the next. In replevin by such assignee against creditors who attached the property after it had been removed from the mill, *held* error to take the case from the jury.

Error to Superior Court of Denver.

THE plaintiffs, Bailey & Allen, kept a feed-stable and corral in Denver, in 1882. One Alexander Kemp, who was engaged in the lumber business on Buffalo creek, in Jefferson county, at a point about thirty-five miles from Denver, became indebted to the plaintiffs for hay in the sum of about \$241. On the 29th of May, 1882, Allen, one of the plaintiffs, went up to Buffalo creek for the purpose of collecting this bill. Kemp appears to have had a store, a saw-mill and a blacksmith shop on Buffalo creek, but the saw-mill had stopped running some days before Allen's arrival, and the business of lumber-making had been discontinued. The teams, harness and wagons previously used in the business were found in Kemp's stables and corrals, and the men who had been employed as drivers and otherwise were still in the lumber camp, but out of employment. Kemp owed them various sums for wages earned, and had executed to them bills of sale of portions of the above-mentioned stock by way of security. No delivery of any portion of the stock appears to have been made under any of them. Allen, upon his arrival in the lumber camp, entered upon negotiations for the payment of the claim due his firm.

9	365
17	61
9	535
19a	13

Kemp informed him that he had no money, and all he could do would be to sell him the stock (horses, mules, harness, wagons, etc.). Allen replied that his firm could handle the stock, but he did not know that they could get for Kemp what it was actually worth, or any given amount of money; that they could sell it for him, and pay themselves out of the money realized. Kemp said he had given bills of sale to men in his employ driving teams and working for him; and, if he sold the stock to plaintiffs, they must secure these men. The precise sums due these men had not been ascertained; but it was estimated at \$705 to the laborers, and \$700 jointly to the foreman, Morrell, and the book-keeper, Adgate, making the total indebtedness to be satisfied out of the property about \$1,646. Allen estimates the property to have been worth about \$2,000. It was finally agreed that the property should be sold and delivered to the plaintiffs on the following terms: It was to be taken in liquidation of the plaintiffs' claim. The plaintiffs were to pay the teamsters and laborers on the following day, in Denver, the several amounts called for by their time-checks, which were to be made out that evening; the balance to be realized from the sale to be made by the plaintiffs was to be paid to the foreman and book-keeper on account of their demands, and for this balance Allen gave them an open acceptance on the spot. He says he would have paid the laborers at the same time if the sums due them had been ascertained; but it was arranged that they should bring the stock down next day, and get their money then. These negotiations were conducted in the presence and hearing of the men holding the liens, and without objections from any of them. An inventory was then taken of the horses, mules, harness and wagons. A bill of sale thereof was executed by Kemp, and delivered to Mr. Allen, and formal possession of the property surrendered to him. Allen then constituted the book-keeper, Adgate, his agent to assume and

hold possession of the property for the plaintiffs until the next day, when he was to send it to Denver by the men to whom the time-checks were to be issued; written instructions to this effect being given the agent. Included in these negotiations was some necessary shoeing of horses, and necessary repairs to the wagons, which were to be done before starting the stock upon the road.

The business having been completed to the satisfaction of all concerned, Mr. Allen returned to Denver, and early next morning, in accordance with agreements and instructions, the teams were put in motion for Denver. When they had reached a point on the highway about five miles out from camp they were overtaken and the property seized by the defendant Johnson, sheriff of Jefferson county, upon a writ of attachment issued out of the district court of Arapahoe county, in an action wherein David C. Dodge and Allen C. Fuller were plaintiffs and said Kemp and one E. Bowen were defendants. The plaintiffs brought the present action in the district court of Jefferson county to recover possession of the property attached, and, by stipulation of parties, the venue was changed to the superior court of the city of Denver. At the close of the testimony upon the trial, counsel for the defendant moved the court to instruct the jury to return a verdict for the defendant, on the ground that the statute declares that a bill of sale made by a vendor of goods and chattels in his possession or under his control, unless the same be accompanied by an immediate delivery, shall be assumed to be fraudulent and void; and this, being a presumption of law, is a question for the court and not the jury. The court sustained the motion and dismissed the action, to which ruling the plaintiffs duly excepted.

Mr. L. C. ROCKWELL, for plaintiff in error.

Mr. E. O. WOLCOTT, for defendant in error.

BECK, C. J. The principal error assigned relates to the withdrawal of the case from the consideration of the jury, when upon the trial on the merits in the superior court, by an instruction to return a verdict for the defendants. It is inferable from this action that, in the judgment of the court, the plaintiffs, Bailey & Allen, had failed to establish a legal ownership or right of possession of the property described in this writ of replevin. The ground of the motion was that the requirements of the statute of frauds had not been complied with in the sale and delivery of the property to the plaintiffs. It was not claimed that the transaction was fraudulent in fact, but that immediate delivery of possession not having been made upon execution of the bill of sale, as required by the statute, the law presumed the transaction to be fraudulent and void.

The statutory provisions referred to, being the fourteenth section of the statute of frauds, are as follows:

"Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith; and this presumption shall be conclusive." Gen. St. 1523.

Addressing our attention to the question of the sufficiency of the delivery and change of possession, it is proper, in the first instance, to consider the nature of the transaction, as the same appears from the testimony of both parties. While the form of the transaction was a sale to Bailey & Allen, the testimony clearly shows it to have been a transfer of the property to them, in the nature of an assignment, charged with certain trusts. The trusts were that the property should be sold by Bailey &

Allen, to whom it was transferred by bill of sale, and that the proceeds of sale should be appropriated to the payment of the following debts of the vendor or assignor, viz.: The debt due Bailey & Allen, the debts due the teamsters and workmen, and the debts due the foreman and book-keeper. It would seem, from the testimony, that the property was in fact taken in liquidation of the claim of the plaintiffs, and that the claims of the teamsters and laborers would also have been paid at the time of the transfer if the amounts due them had been then known. But the plaintiffs were not bound, by their agreement with Kemp, to pay Morrell and Adgate any definite sum. These men appear to have been deferred creditors in the transaction, and were to receive, as per their acceptance, whatever balance there might be of the proceeds of sale to be made by plaintiffs over and above the amounts due the other creditors mentioned.

In support of the proposition that there was not a sufficient delivery of the property, nor such a continued change of possession as the statute requires, we are referred to that portion of the testimony which discloses that Kemp's employees held bills of sale of the property, and that the stock, as counsel allege, was in their possession when it was seized in attachment by the defendant. A review of the testimony fails to show any delivery whatever of the property by Kemp to his employees, as purchasers, under the bills of sale, or that the latter had ever demanded a delivery. The employees do not appear to have claimed as purchasers, nor to have construed their bills of sale as evidence of purchase, but as *liens* held to secure payment of the wages due them, respectively. The delivery, therefore, to Allen at the camp was good as to all the parties present and consenting to it, and he and his partner took the property charged with the several trust specified.

Had the sheriff arrived in camp that day, and executed his writ of attachment while the animals and other prop-

erty remained on the grounds, and in the stables and corrals of Mr. Kemp, the case would have presented a very different feature. But no levy of the writ was made until some time next morning, when the stock was *en route* for Denver, and distant about five miles from camp. Both the title and the possession were then in the plaintiffs. Their agent, Adgate, in obedience to written instructions from Allen, had placed these men, who held time-checks from Kemp, in charge of the property for a special purpose,—that of removing it to the stables of the plaintiffs in Denver. Having accepted the charge, they became, for the purpose mentioned, the agents of the plaintiffs. The property was therefore legally in the possession of the plaintiffs at the time of the levy of defendant's writ. The requirements of the statute in question were, in our judgment, duly satisfied. On the day previous to the seizure Kemp had these goods and chattels in his possession and under his control. While so possessed of them, he conveyed the title, and surrendered the possession thereof, to the plaintiffs, for lawful purposes, and for a sufficient consideration. The plaintiffs, through their agents, had assumed the full dominion and control of the property. The formal delivery at the camp became, as to all persons, a valid delivery by the removal of the property from the premises of the former owner by those who constituted themselves agents of the plaintiffs for that purpose. There was nothing in these circumstances to mislead the defendant, but much to put him on the inquiry as to the ownership of the property at the time of the seizure. The saw-mill had been shut down, and the lumber business discontinued several days before. The men and teams were not engaged in their usual employments. It would seem that these facts were known to the defendant, for he admitted upon the trial that he knew the teams were going away on that morning, and that he had arisen early, and followed and overtaken them.

But if we assign to the transaction its true legal character, that of a partial assignment for the benefit of creditors, it is equally supported by the evidence. It was a voluntary transfer by Kemp, the debtor, without compulsion of law, to Bailey & Allen, in trust to sell the same, and to apply the proceeds in payment of certain preferred creditors. And, as before stated, those interested in the property by virtue of liens stated by and consented to the transfer. That partial assignments of this nature are valid under our statute was decided by this court at the last December term, in the case of *Campbell v. Colorado Coal & Iron Co. ante*, p. 60.

The court erred in withdrawing the case from the consideration of the jury upon the facts and the law, and in directing a verdict for the defendant in error, for which error the judgment is reversed and the cause remanded.

Reversed.

HINDREY V. WILLIAMS.

1. A contract to cut, cure and stack hay on a ranch, at so much per ton, which does not specify what number of tons are to be cut, nor any given number of acres to be mowed, and under which neither the work to be done nor the amount to be paid is in gross, is a separable, not an entire, contract; and, where the hay is burned, the loss falls on the owner, and the contractor, being innocent, can recover for his labor notwithstanding.
2. In such a case it is a fatal defect in a defense which attempts to show that the hay was not well stacked, and had to be restacked by defendant, to fail to show that defendant paid any given sum for the restacking, or that it was worth any given amount.
3. Where a contract by which plaintiff agreed to cut, cure and stack hay on defendant's ranch contains a stipulation that the hay shall be measured within thirty days, and defendant fails to measure it, and it is burned, he is estopped by such default from alleging, by way of defense to plaintiff's claim, that the hay had not been measured.

4. In civil cases, the court, on the recording of the verdict, may allow or refuse the jury to be polled, in his discretion; but, if there should be any good reason, a request by either party to test the unanimity of the jury by a poll should be allowed.

Appeal from District Court of Weld County.

THIS action was brought by Williams, the appellee, in the county court of Weld county. The case was afterwards taken by appeal to the district court, where a trial was had by a jury. Verdict and judgment in favor of the plaintiff for \$814, with interest at ten per cent. from September 15, 1883. The complaint is as follows: (1) That on or about July 20, 1881, plaintiff agreed with defendant to cut, cure and stack grass or hay growing on defendant's ranch in Weld county, for the wages, price or sum of \$2.75 per ton for every ton so harvested by cutting, curing and stacking; (2) that on or about July 25, 1881, plaintiff commenced said work, and labored at it steadily with men and machinery until finished, about September 1, 1881; (3) that, during said time, plaintiff cut, cured and stacked for defendant, as agreed, twenty-four stacks of hay, which contained in all two hundred and thirty-seven and one-half tons of hay by actual measurement, and also four other stacks not measured, containing about sixty tons, making in all about two hundred and ninety-seven and one-half tons of hay harvested by plaintiff, as aforesaid; (4) that defendant has not paid the price of said labor, or any part thereof, or any sum or sums whatever, for harvesting said two hundred and ninety-seven and one-half tons of hay, according to agreement or otherwise; (5) jurisdictional averment. Demand of judgment for \$818.12, and costs.

The answer denies all the material allegations of the complaint, and, for a second defense, the answer alleges: (1) That defendant says that plaintiff, on or about the 20th day of July, 1881, undertook, promised and agreed with defendant to cut, cure and make into hay all the

grass that year growing upon defendant's ranch; and, further, to put said hay up, and leave the same in stacks, in a good, thorough and workmanlike manner, so that the same would be well protected and stand safely,—in consideration that defendant would pay him for said work, when completed as agreed, at the rate of \$2.75 per ton for so doing; that said agreement was the same referred to in complaint. (2) That plaintiff failed and neglected to carry out, perform or finish the work so by him agreed to be done and performed, in this: said plaintiff, disregarding said contract and agreement, wholly failed to cut, cure or stack an amount of grass that year growing on said ranch of defendant equivalent to and capable of being made into one hundred tons of hay or thereabouts, if properly and in due season cut, cured and stacked, whereby said grass, so neglected by plaintiff, went to waste, and was wholly lost to defendant; and, further, said plaintiff failed and neglected to leave upon said ranch a large portion of the hay cut by him, but negligently and carelessly suffered the same to take fire and burn, and thus become utterly destroyed by and through the negligence of plaintiff and his employees,—said hay, so destroyed by fire, being about one hundred tons. And defendant further says that the hay which was cut and stacked, and left upon said ranch, was not stacked in good, thorough or workmanlike manner; but, on the contrary, was stacked in such a careless and unworkmanlike manner that the major portion and nearly all of said hay so stacked fell down, whereby it became exposed to rain, and became greatly deteriorated in quality and value. (3) That, by reason of the failure of plaintiff to perform his contract and agreement as aforesaid, and his failure to cut a large portion of defendant's grass as agreed, and the negligence of plaintiff in allowing and causing a portion of said hay cut by him to burn, and by his failure to stack said hay left by him on the ranch in a good or workmanlike manner, defendant was

damaged in the sum of \$1,000. (4) Demand of judgment against plaintiff in the sum of \$1,000, and costs.

The terms of the agreement, as shown by the evidence, are sufficiently stated in the opinion.

Messrs. HAYNES, DUNNING and ANNIS, for appellant.

Mr. JAMES W. MCCREERY, for appellee.

ELBERT, J. This is not the case of an entire contract "where an entire promise is made on an entire consideration." It consequently does not fall within the class of cases cited by counsel for the appellant, where, in case of loss by fire or otherwise before the work is completed, the owner loses his property and the laborer his work. It is a separable contract. No given number of tons were to be cut. No specific number of acres were to be mowed. Neither the work to be done nor the amount to be paid was in gross. The plaintiff was to "cut, cure and stack hay upon the defendant's ranch at \$2.75 per ton, to be measured in thirty days." Of the legal character of such a contract there can be no difference of opinion. 1 Add. Cont. 392 *et seq.*; 2 Pars. Cont. 517 *et seq.* Under it the plaintiff cut, cured and stacked two hundred and ninety-six tons of hay. Two hundred and thirty-six tons were measured, and no controversy arises respecting them. Sixty tons were destroyed by fire, and the contention is as to where the loss must fall. Two points are made by the appellant: *First*, that *all* the hay was not stacked; *second*, that it was not measured. If all the hay cut was not stacked it would not preclude the plaintiff from recovering compensation for what was stacked; nor does it appear that he was allowed to recover for hay unstacked, either burned or unburned. If the fact that the sixty tons burned were not measured could in any case affect the right of the plaintiff to recover therefor, it can have no such effect in this case, in view of the evidence showing that the

time in which it should have been measured had expired, and that the default was that of the defendant.

The loss must fall upon the party having the title to the property destroyed. The hay was cut, cured and stacked on the ranch of the defendant. The grass, before the cutting, was the property of the defendant. It was none the less so after it was cut, cured and stacked. The plaintiff had expended labor upon the grass at an agreed price per ton,—had made it into hay,—but he had no property in the product. The legal possession was also that of the defendant, and neither delivery nor acceptance is a feature in the case. If it can be said that the hay, after it was stacked, was to any extent in the care and custody of the plaintiff, the evidence shows that he exercised reasonable diligence and prudence touching its safety, and the jury so found. The plaintiff was entitled to recover for the sixty tons destroyed by the fire.

If the work was not well done, the defendant could recoup his damages; and this he sought to do, under his pleadings, by evidence showing that the meadow was not well cut, and also that the hay was not well stacked. The evidence, however, upon these points, was conflicting, and we see no reason for disturbing the verdict of the jury. There was a fatal defect in the case made by the defendant in this behalf, in this: that, while the evidence tends to show that a portion of the hay was not well stacked, it does not show that the plaintiff paid any given sum for the restacking, or that it was worth any given amount. The jury were left to conjecture how much, if anything, the restacking was worth. In view of this, the objection that the plaintiff, Williams, was permitted to testify "all that was stacked was reported to me, from time to time, as perfectly sound and good," becomes unimportant. If the testimony thus objected to can be taken (which is doubtful) to refer to the character of the stacking, and not to the condition of the hay when stacked, it nevertheless concerns an issue upon

which, as we have seen, the defendant could not recover by reason of his failure to prove any damage.

The second assignment argued by counsel goes to the refusal of the court to poll the jury, before the verdict was recorded, upon the request of the defendant. Upon this point our statute is silent. It provides that the names of the jurors, upon their return into court, shall be called, "and they shall be asked by the court or the clerk whether they have agreed upon their verdict; and, if the foreman answers in the affirmative, they shall, on being required, declare the same;" and, further, that "when the verdict is given, and is not informal or insufficient, the clerk shall immediately record it in full in the minutes, and shall read it to the jury, and inquire of them whether it be their verdict. If any juror disagree, the jury shall be again sent out; but, if no disagreement be expressed, the verdict shall be complete, and the jury shall be discharged from the case." Sections 177, 179, Amended Code.

Upon the right of a party to demand a poll of the jury before the verdict is recorded, the rulings differ in different states. In some of the states, in both civil and criminal cases, it is regarded as a right which may not be denied. *Jackson v. Hawks*, 2 Wend. 619; *Fox v. Smith*, 3 Cow. 23; *James v. State*, 55 Miss. 57; *Johnson v. Howe*, 2 Gilman, 342; *Blackley v. Sheldon*, 7 Johns. 32; *Rigg v. Cook*, 4 Gilman, 336; *Labar v. Koplín*, 4 N. Y. 550; *Hubble v. Patterson*, 1 Mo. 392; *Stewart v. People*, 23 Mich. 76. To some extent these decisions rest upon the proposition that opportunity should be given to the juror to correct a verdict which he has mistaken, or about which, upon further reflection, he has doubt; and it is to be observed that such opportunity is fully provided for by the provisions of the code above quoted. In other of the states it is regarded as a matter resting entirely in the discretion of the court, but which the court will generally allow when there are any circum-

stances of suspicion attending the delivery of the verdict. *Blum v. Pate*, 20 Cal. 70; *Martin v. Maverick*, 1 McCord, 24; *Landis v. Dayton*, Wright (O.), 659; *Rutland v. Hathorn*, 36 Ga. 380; *Fellows' Case*, 5 Greenl. 333; *Com. v. Roby*, 12 Pick. 513; Proff. Jury Trial, 465. It is a matter of practice, and in civil cases we see no reason for holding that either party may demand that the jury be polled as a matter of right. We think that such a request may safely and properly be left as resting in the sound discretion of the court. If there should be any good reason for allowing either party, by a poll, to test the unanimity of the jury, the request should be granted.

The foregoing constitutes all the assignments argued by counsel. The judgment of the court below must be affirmed.

Affirmed.

ANFENGER ET AL. V. ANZEIGER PUB. CO.

In an action against the directors of a corporation brought under Gen.

St. 184, section 16, making directors jointly and severally liable for the corporation debts for the preceding year, on their failure to file the report of debts and capital required by the statute, the complaint is bad if it fails to aver that the corporation was doing business in the county in the recorder's office of which it claims the report should have been filed, to set out the contract of indebtedness on which the action is brought, the default of the corporation, and the directorship of the defendants, as of such dates as to show the liability of the defendants under the statute.

Appeal from County Court of Arapahoe County.

THIS action was brought against the appellants, as directors of the German Printing Company, under the following statute:

"Sec. 16. Every such corporation shall annually, within sixty days from the 1st day of January, make a

9	377
8a	199
9	377
10a	150
9	377
10a	154

report, which shall state the amount of its capital, and the proportion actually paid in, and the amount of existing debts, which report shall be signed by the president or secretary of said company, under its corporate seal, and filed in the office of the recorder of deeds of the county where the business of the company shall be carried on. And if any such corporation shall fail so to do, unless the capital stock of said corporation has been fully paid in, and a certificate made and filed as provided in section twelve (12) of this act, all the directors or trustees of the company shall be jointly and severally liable for all the debts of the company that shall be contracted during the year next preceding the time when such report should, by this section, have been made and filed, and until such report shall be made." Gen. Laws, 184.

Messrs. BARTELS and BLOOD, for appellants.

ELBERT, J. The complaint is bad. The averment that the defendant company failed to file the financial report required by the statute in the office of the recorder of deeds of the county of Arapahoe has no force, without the further averment that the defendant company carried on its business in that county. Unless this last was the fact, the statute cast upon it no duty to file the report in the county of Arapahoe. The default of the company upon which the liability of the defendants depends does not appear. Neither does the complaint allege, except inferentially, when the debt was contracted. The language of the statute is: "The directors or trustees of the company shall be jointly and severally liable for all the debts of the company that shall be contracted during the year next preceding the time when such report should, by this section, have been made and filed, and until such report shall be made." The contract of indebtedness, the default of the corporation, and the directorship of the defendants, should all be averred, and as of such dates as

to show the liability of the defendants under the statute. The court erred in overruling the demurrer to the complaint.

The judgment is reversed and the cause remanded, with leave to the plaintiff to amend.

Reversed.

UNION PAC. R. R. Co. v. JONES.

9	379
19	397

Where, on the trial of an action for damages against a railroad company resulting from fire coming from an engine alleged to belong to defendant, the defendant denies that it operated the railroad running through plaintiff's farm, the uncontroverted evidence, by a station agent of defendant, that the defendant company ran its trains over the road running through plaintiff's farm, though not going clearly to the date of the fire; also that defendant sent him, soon after the fire, to see plaintiff respecting it, and to report concerning it,—is sufficient to establish the fact that defendant was operating the road at the time of the fire, and regarded itself as liable for damages.

Appeal from County Court of Boulder County.

THIS was an action brought before a justice of the peace by Jones, the appellee, to recover the sum of \$156 damages for grass and pasturage burned on his farm by a fire set out by the defendant company. The case was afterwards appealed to the county court, where trial was had to the court. The defendant denied setting out the fire; denied that it operated the railroad running through the appellee's farm; denied that it ran the locomotive which it was alleged set out the fire; denied that it was in any way indebted to the plaintiff. Judgment against the defendant company for \$109, and costs of suit. Appeal to the supreme court.

Messrs. TELLER and ORAHOD, for appellant.

Mr. CHAS. M. CAMPBELL, for appellee.

ELBERT, J. We think it sufficiently appears from the testimony of Van Riper that the defendant company operated the Boulder Valley road at the time of the fire. The witness was the station agent of the defendant company at Boulder; and while his testimony, to the effect that the Union Pacific Railway Company "ran its trains over the Boulder Valley road," is general, and does not clearly go to the date of the fire, the act of the company in sending him, soon after the fire, to see the appellee, Jones, respecting it, and to report concerning it, but without power to settle the damages, is inconsistent with any other theory than that the defendant company was operating the road at the time of the fire, and regarded itself as a party concerned in any claim for damages resulting therefrom. From all the evidence, it is also reasonably clear that the appellee's grass was fired by sparks from a locomotive attached to one of the defendant's freight trains.

The judgment of the court below is affirmed.

Affirmed.

9	380
11	312
9	380
13	171
13	173
13	215
13	584
13	586
9	380
15	272
9	380
8a	539

SMITH V. BAUER.

1. Property in the hands of the marshal under a writ of attachment from the federal court cannot be interfered with by the sheriff under process from a state court, though the possession of the marshal be wrongful and not by virtue of a proceeding *in rem*. But where the consent of the federal court to proceed in the state court against the marshal is first obtained the rule is otherwise.
2. The question of comity involved in such cases is not jurisdictional.¹
3. A pleading defective in a matter not jurisdictional cannot be first assailed after answer and trial.

Error to District Court of Pueblo County.

BAUER brought his action of replevin in the state court,

¹ The foregoing question of comity between state courts referred to but expressly left undetermined.

claiming ownership and right to possession of the goods and chattels described in his complaint. Smith, among the defenses set up in his answer, averred that he held the property as United States marshal by virtue of levies under writs of attachment duly issued out of the circuit court of the United States for the district of Colorado in two certain suits brought against one Julius Kessler. At the trial the foregoing matters set up in the answer were admitted to be true; but the court, nevertheless, tried the issue of ownership and right to possession, and the same was determined in favor of Bauer. To reverse the judgment thus entered this writ of error was sued out. The complaint contained, *inter alia*, the following averment: "That prior to the commencement of this action the plaintiff obtained leave from the circuit court of the United States to sue the defendant, who is and was United States marshal for the district of Colorado."

MESSRS. PATTON and URMY, for plaintiff in error.

MR. JOHN M. WALDRON, for defendant in error.

HELM, J. 1. The supreme court of the United States, in *Freeman v. Howe*, 24 How. 450, announce the doctrine that, when property is in the hands of the United States marshal under a writ of attachment duly issued from a federal court, his custody thereof, even though it be wrongful, and though not by virtue of a proceeding *in rem*, cannot be interfered with by the sheriff, acting with the authority of process issuing from a state court. The conclusion reached in that opinion has been adhered to in later decisions by the same august tribunal; and, although no construction of the constitution or laws of the United States was involved, it is accepted, we believe, by all of the state courts of last resort which have had the question before them. It was adopted by us in *Parks v. Wilcox*, 6 Colo. 489.

This principle or rule of procedure is, however, not de-

cisive of the case at bar. The precise question here presented is: May the state court, notwithstanding the rule, determine all the rights of plaintiff in the replevin case, where the pleadings show that *consent of the federal court to proceed in the premises against its marshal was first obtained?* It is obvious that the institution of suit for property, in a court other than the one asserting control thereof, may be a matter of great convenience and economy to litigants. Such proceeding may also be a relief to the latter court itself. The last suggestion is particularly true of the class of cases now under consideration, since the effect of the rule mentioned is to draw into the federal courts litigation which is not contemplated by the provisions of the constitution and laws defining their jurisdiction. If, therefore, the course pursued in the case at bar can be sustained without doing violence to the foregoing rule, in our judgment it should be. The principle of non-interference with each other by courts of concurrent jurisdiction, which, with proper limitations, is so universally acknowledged and so widely commended, is one both of comity and necessity. *Peck v. Jenness*, 7 How. 612. It rests mainly upon the following very excellent reason: Without it, an embarrassing element of discord and uncertainty would be introduced into judicial procedure. Unseemly interference and conflict would often exist in the attempt, by different tribunals, to exercise contemporaneous jurisdiction over the same causes or the same subject-matter, while disastrous consequences might follow to the immediate parties in interest. But when, in cases like this, the court under whose control property is, gives its prior unqualified consent to the replevin action before another tribunal, can it be said that the foregoing reason is applicable? Such consent may fairly be construed to show the intention of the court giving it to relinquish temporarily the control possessed, and to be governed, so far as needful, by the result attained in the replevin suit. Hence there is no

more confusion than would exist had the writ of replevin issued from the latter court, or had the claimant intervened therein in the original attachment proceeding. The danger of conflict is avoided, and the principle of comity is fully satisfied. We are constrained to hold that since in the case at bar the reason for the rule fails, the rule itself should not be applied.

2. It is, however, urged by counsel for plaintiff in error, that, admitting the correctness of the foregoing conclusion, the averment of the complaint before us, relating to consent by the federal court, is wholly insufficient. They assert that, since the averment in question does not specifically show that the consent referred to covered this particular suit, and the tribunal in which it was brought, the complaint does not bring the case within the exception, and that for this reason it fails to state a cause of action. The principle of "comity and necessity," above mentioned, is, in its various applications, often spoken of as though the question involved were one of jurisdiction. We think the language thus used inaccurate, and that, perhaps, counsel have been misled thereby. Unless a concurrence of the right to jurisdiction over the subject-matter or the cause of action, as the case may be, exists, the necessity for invoking the rule could not arise. The question, properly speaking, is not has the court jurisdiction to entertain the proceeding? but, ought it to do so? Should not the exercise of its acknowledged jurisdiction in the premises be held in abeyance until the control of the other court has terminated? Would not the issue and levy of its process be a violation of that comity which should be maintained towards another judicial tribunal? And is it not an imperative duty, under the circumstances, to withhold, for the time being, its action, because of the serious mischief that would follow from a general recognition in practice of the opposite course?

When courts, in the trial of such causes, discover that

the officer acted under a valid process, and hence that this principle of comity has been disregarded, they do not always immediately dismiss the same. They sometimes retain the cases and take such steps as will repair the injury committed. In actions of replevin final judgment is entered, if necessary, awarding a return of the property, or payment of the value should the return be impossible. *Booth v. Ableman*, 16 Wis. 485; *Booth v. Ableman*, 18 Wis. 519; *Feusier v. Lammon*, 6 Nev. 209; *Parks v. Wilcox*, *supra*.

The averment under consideration is defective in the particulars mentioned, and plaintiff might have been compelled to amend his pleading had it been assailed at the proper time. But the subject to which the averment relates is not jurisdictional. An answer was filed and the cause was fully adjudicated, no objection being made on this ground till the trial was concluded and the verdict returned. The evidence of plaintiff is not before us, and we must presume that his proofs supplied such material matters as the averment may have omitted. The defect in question is of such a nature that, upon this record, it could not, for the first time, be complained of after verdict.

This opinion, it will be observed, makes no reference to cases of replevin brought by the owner in one *state* court for property wrongfully taken by the sheriff under writs of attachment or execution issuing from another *state* court of concurrent jurisdiction.

The judgment will not be disturbed.

Affirmed.

RARA AVIS GOLD & SILVER MINING COMPANY V.
BOUSCHER.

1. An instruction which is not based upon facts in evidence, nor upon the pleadings, may be ground for reversal.
2. Services rendered in planning and superintending development work upon mines, and the erection of a mill and machinery, are work and labor within the meaning of the mechanic's lien statute. But not so as to labor as disbursing agent and accountant.
3. The "incidental" labor for which liens are allowed under the statutes must be directly done for and connected with, or actually incorporated into, the building or improvement.

Appeal from District Court of Gilpin County.

PLAINTIFF Bouscher brought his suit in the court below to recover upon the *quantum meruit* for services rendered to the defendant company. He also prayed a lien, under the mechanic's lien law, upon the property described. Plaintiff's services consisted of work as foreman, superintendent and mechanic upon certain mines belonging to defendant; also of labor as defendant's agent in disbursing its money, and in keeping its accounts. Defendant, in its answer, after pleading the proper denials, sets up a contract with plaintiff which provided for a specific monthly salary, and avers that the same was fully paid. Defendant also demands a judgment against plaintiff for his misappropriation of certain of its money's, and for injuries suffered through his negligent and unskilful development of its mines, and his negligent and wasteful disbursement of its funds.

The trial resulted in a verdict and judgment in plaintiff's favor for the sum of \$2,404.67. A lien for the entire judgment was also decreed. From this decree and judgment the present appeal was taken.

The instruction referred to in the opinion is as follows:
"No. 2. The court instructs the jury that if you find from the evidence that the value and amount of ore in

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16a	346
9	385
20a	331
9	385
38	320

sight, or on the dump, did not realize the amount reported by Bouscher as being in sight and on the dump, and you find that Bouscher's report was made to the company in good faith, or that Bouscher was mistaken, or that the report was sent to the company for the purpose of selling stock, and the company were not deceived thereby, or that the report was ratified by the members of the company, directors, or some of them, with agents appointed for the purpose, or the company, after such report was submitted, examined the mine, and the subject-matter of such report, and did not object to it, but went on, and expended the company's money, under Bouscher's direction, then you must not find any damages for the company, no matter what such report contained."

The mechanic's lien law in force at the time of the transaction is entitled "An act to secure liens to mechanics and others." Section 4 reads: "All miners, laborers, and others who work or labor to the amount of \$25 or more, in or upon any mine, lode or deposit, * * * shall have, and may each respectively claim and hold, a lien. * * *" Section 1 thereof also reads: "All artisans, mechanics, and others who shall perform work or labor * * * for the construction or repair of any building, or other superstructure, shall have, and may claim and hold, a lien. * * *".

Mr. ALVIN MARSH, for appellant.

Messrs. H. M. ORAHOOD and J. E. ROCKWELL, for appellee.

HELM, J. There is nothing in the pleadings or evidence that calls for the second instruction given on behalf of plaintiff below, or for any instruction whatever upon the subject-matter therein contained. The damages which defendant sought to recoup were — *First*, \$1,045.23 of its funds, alleged to have been wrongfully appropriated by

plaintiff to his own use; and, *second*, such a sum as would compensate the injuries occasioned by plaintiff's negligent and unskilful working of the property, and his negligent and wasteful use of defendant's money. No controversy exists in the case as to the accuracy or good faith of plaintiff's report touching the amount or value of ore visible in the mine and on the dump, nor is there a claim for damages in any way arising out of this report. The jury were probably misled by the instruction in question, and the judgment must be reversed.

Other serious, perhaps fatal, objections are urged under the assignment of error relating to this part of the charge; but, in view of the foregoing conclusion, it is wholly unnecessary to discuss them. As the cause will be remanded for a new trial, however, we feel bound to consider a further question which has received careful attention in the arguments filed. Plaintiff's services in planning and superintending development work upon the mines, and in planning and supervising the erection of the mill and machinery, are work and labor in or upon the property, within the meaning of the statute. Such services are similar to those performed by the architect who draws the plans, and personally superintends the construction of a building. The latter is, under statutes containing the words "any person," or the equivalent expression "and others," performing labor, etc., uniformly allowed a lien. Kneel. Mech. Liens, § 13a; Phil. Mech. Liens, § 158.

But, besides the foregoing services, plaintiff demanded, and the court recognized, a statutory lien for labor as disbursing agent and accountant. Statutes of the kind under consideration are to be construed liberally in favor of the classes sought to be protected thereby. But it would be palpable judicial legislation for courts to extend their provisions so as to include demands not fairly covered by the language used. *Barnard v. McKenzie*, 4 Colo. 251; *Edgar v. Salisbury*, 17 Mo. 271. Hence, while liens

are allowed for many kinds of labor that the authorities term "incidental," such incidental labor must be directly done for, and connected with, or actually incorporated into, the building or improvement. It will not do to extend the protection given to services indirectly and remotely associated with the construction work. The cook who prepares food for the employees, the blacksmith who shoes the horses or repairs the implements in use, and all similar contributors to the enterprise, are not among the favored workmen. See *McCormick v. Los Angeles*, 40 Cal. 185. The keeping of defendant's books, and disbursement of its funds, were matters of great importance; but we cannot declare such services within the purview of the statute.

Plaintiff, if entitled to recover at all upon the *quantum meruit*, might properly have his judgment and lien for *part* of the services rendered. Their value, in such case, can be proved independently of the objectionable claims above mentioned. But since the judgment was given, and the lien allowed for his improper as well as his proper claims, the decree could, in no event, be permitted to stand.

The judgment is reversed, and the cause remanded for further proceedings.

Reversed.

WALKER V. STEEL.

1. A partner who, upon dissolution of the firm, has become the owner of a partnership account may sue thereon in his own name under the code.
2. Under section 379 of the code all objections to the manner of certifying and returning a deposition are waived unless presented before the trial.

Appeal from County Court of Gunnison County.

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5a	464
9	388
37	157

Mr. W. H. FISHBACK, for appellant.

Messrs. THOMAS and THOMAS, for appellee.

HELM, J. 1. There was, in this case, no defect of parties plaintiff. The partnership had, in fact, been dissolved several months when the suit was brought; and plaintiff, through the settlement between himself and copartner, and his purchase of the partnership property, had become the exclusive owner of the account sued on. He was therefore the only party really interested in collecting the balance due. Hence, under section 3 of the Code of Civil Procedure, the action was properly brought in his name alone. *Bassett v. Inman*, 7 Colo. 270. The common law principle that an action for a partnership debt, whether instituted before or after dissolution of the firm, must be prosecuted in the name of all the partners, does not, under the present practice, and the facts disclosed, apply to this case.

2. The deposition of Coslett was properly admitted in evidence. Defendant's principal objections relate to the manner of certifying and returning the same. It was his duty to have had all such questions disposed of before the trial. Code Civil Proc. § 379. Having failed to call the court's attention thereto till the deposition was offered, he must be held to have waived irregularities in these respects, if any existed.

3. It is not necessary for us to determine whether or not a proper foundation was laid for the admission of the books of original entry. The cause was tried to the court without the intervention of a jury. The bill of exceptions shows affirmatively that "said books, nor any of them, were not opened or read in evidence in said cause, nor examined by the court." We are therefore informed by the record itself that the findings of the court were not based upon evidence of the account afforded by the books, and we are of opinion that, without the books, the proofs sufficiently support the judgment.

Plaintiff testifies that he had frequently sent defendant statements of his account, and often had conversations with him regarding his bill; that defendant never denied nor disputed the bill, but frequently said he would pay it as soon as he could raise the money; that he even promised to borrow money on his property, and pay the same. Defendant does not deny the rendering of these statements of account, nor his promises to pay the balance due as shown thereby. He testifies that he handed them to his attorney to be examined, and that his attorney did not report anything wrong with them. He made no effort at the trial to prove that any item was erroneously charged, and did not deny the correctness of the balance claimed. The nearest he came to a denial in this regard was the declaration of his ignorance as to whether or not the books showed any remaining indebtedness upon his part.

Under the foregoing facts we think the court was justified in finding for the plaintiff, and in giving judgment accordingly.

Affirmed.

LAMPING V. KEENAN.

Where the defendant, in an action of replevin before a justice of the peace, has contested the case upon the merits, on a claim of a superior right to the property, and the judgment has been given against him, he cannot maintain on appeal that, as an innocent purchaser, replevin will not lie against him without a demand and his refusal to deliver up the property; a demand is not necessary where the defendant claims the same right, both as to ownership and possession, as the plaintiff claims, and that his right is derived from the same source.

Appeal from County Court of Lake County.

THIS was an action of replevin, brought by the plaintiff below, Thomas Keenan, against the defendant, Joseph Lamping, for the recovery of a span of mules and a set of double harness. It was originally instituted before

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6a	62
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12a	25M
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14a	408
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138	210

a justice of the peace, who gave judgment for defendant Lamping. Keenan appealed to the county court, and upon trial there recovered a judgment awarding a return of the property, or, if a return could not be had, that he recover the sum of \$95, the value of the property. The evidence shows that Thomas Keenan purchased the property from Martin Keenan, in his life-time, who was the owner thereof, receiving a bill of sale dated September 21, 1880, and that, before and at the time of receiving the bill of sale, the purchaser was in possession of the property; that some time afterwards he leased the property to one Annie Gibbons, and then went to Kansas City. That Martin Keenan died soon after the sale; and, during the absence of the plaintiff, a creditor of the estate of deceased brought suit in attachment before a justice of the peace against the administrator, causing the writ of attachment to be levied upon the property while in the possession of said lessee; that he recovered a judgment, caused an execution to be issued thereon, and the property in controversy so seized to be sold on such execution, and that defendant Lamping purchased the property at the constable's sale. In further support of the defendant's title, he was permitted to introduce in evidence, against the objections of the plaintiff, a lease of the mules in controversy to one Annie D. Griffen, purporting to have been executed by the said Martin Keenan about one and a half months subsequent to his execution of the bill of sale to the plaintiff, Thomas Keenan. It was conceded that the property was in possession of the plaintiff's lessee, Annie Gibbons, at the time of the seizure on the writ of attachment. It was also conceded that no demand for the possession was made by the plaintiff prior to bringing the present action.

Mr. CHARLES S. THOMAS, for appellant.

Messrs. W. T. ROGERS and G. H. THOMPSON, for appellee.

BECK, C. J. This action having been commenced in a justice's court, no written pleadings appear in the case, but an inspection of the proceedings shows that the claims to the property in dispute set up by both parties to the controversy are precisely the same; that is to say, both parties claim ownership and right to possession by virtue thereof, and both trace title to the same source. The property was originally owned by Martin Keenan, in his life-time. The plaintiff, Thomas Keenan, claims to have purchased it from the owner direct; while the defendant, Lamping, claims to have purchased the same at an execution sale held pursuant to judicial proceedings against the administrator of said Martin Keenan, deceased. This latter proceeding was commenced by attachment, and the property was attached to satisfy the claim of a certain creditor of the deceased. The trial of this replevin suit, therefore, was on the merits; and the plaintiff succeeded in establishing a regular and valid title, with right of possession, while the defendant signally failed to establish either. The defendant's proof showed a personal judgment against the administrator, and an execution issued against the express inhibition of the statute. The entire proceeding was consequently without any validity whatever. Gen. Laws, § 2924; *Mattison v. Childs*, 5 Colo. 78.

Counsel for appellant say that they do not claim the judgment of the justice of the peace has any binding force; nor that the sale on execution conveyed any title to the purchaser if the property sold belonged to a stranger to the action; but they insist that the possession thus obtained by the appellant was not tortious, and that replevin will not lie in such a case, without a demand upon the purchaser, and his refusal to deliver up the property. This might be a tenable proposition if the defendant's position on the trial below had been consistent with it. But it was not so, in any view of the proceedings as presented to us by the record. His position

was not that of one who had innocently come into possession of the chattels, and claimed a right to retain them until such rights should be terminated by a demand therefor by the true owner. On the contrary his claim was that he was the true owner himself, by virtue of his purchase at the execution sale. He testified that he had paid every dollar the property was worth, and introduced other testimony to the same effect. He also attempted to impeach the plaintiff's title, and to show that it was not acquired in good faith, by proof that Martin Keenan, the vendor, treated the property and dealt with it as his own long after the execution of the bill of sale to the plaintiff. The defendant having, therefore, contested the case upon the merits, on a claim of superior right to the property, the case is brought within the class of cases wherein a demand is not required. It also comes within the principle that proof of any circumstance which would satisfy a jury that a demand would have been unavailing is sufficient to excuse this proof. Wells, Repl. §§ 373, 374, and cases cited.

The decisions upon the question when a demand is necessary are neither uniform nor entirely reconcilable; but we think the better doctrine is that a demand is only required when it is necessary to terminate the defendant's right of possession, or to confer that right on the plaintiff; but when the plaintiff claims the ownership of the property, and the right of possession as incident to that ownership, and the defendant's right claimed is precisely the same, as in the present case, no demand is necessary. The opinions of the courts in the following cases are cited, in so far as they sustain the views above expressed: *Smith v. McLean*, 24 Iowa, 322; *Eldred v. Oconto Co.* 33 Wis. 140; *Shoemaker v. Simpson*, 16 Kan. 43, 52; *Pyle v. Warren*, 2 Neb. 241, 253; *Homan v. Laboo*, 1 Neb. 204, 210.

For the reasons assigned, we are of the opinion that the judgment in this case should be affirmed.

Affirmed.

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10a	518

BILLIN ET AL. V. HENKEL ET AL.

1. Where the statute of frauds was pleaded to an alleged contract for the sale of goods, and no note or memorandum in writing having been made and subscribed by the parties, and no part of the goods, or the evidence of them, having been accepted and received by the purchaser, nor any part of the purchase money paid at the time of the transaction, *held*, that the contract of sale was within the statute, and void.
2. A void contract, under the statute, may not be rendered valid by performance on the part of one party only; the vendee must not only receive but accept the goods bargained for, in order to pass the title.
3. Before secondary evidence can be given of an instrument in writing, there must be proof of a diligent and *bona fide*, but unsuccessful, search for such instrument in the place where the same belongs, is generally kept, or most likely to be found.

Appeal from County Court of Pueblo County.

APPELLEES brought suit in the county court of Pueblo county against the appellants, on an account for goods sold and delivered appellants on the 3d day of May, 1881, amounting to the sum of \$221.85.

The answer of the appellees denied the indebtedness, and set up the statute of frauds as to the alleged contract of sale, averring that no note or memorandum of it was in writing; that no part of the goods had been accepted or received by the appellants, and that no part of the purchase money had been paid.

Judgment was given for the appellees in the county court, for the amount of their demand, and also in the district court, on appeal from the judgment of the county court.

It appeared from the evidence that the appellants Billin and Huston called personally at the place of business of the appellees, in Pueblo, for the purpose of purchasing a quantity of coal oil. That appellees were merchants and kept such oil in stock in their warehouse. That after some time spent in negotiations, appellants verbally ordered the shipment to their place of business, at

Poncha Springs, by way of the Denver & Rio Grande Railroad, of twenty barrels of coal oil, of the grade known as "110 test," and for which they agreed to pay the appellees twenty-one cents per gallon.

The oil was put up and delivered to the railway company in good condition on the same day, or next morning, and a bill of lading given therefor to the appellees, specifying that the goods were received for shipment "at the owner's risk."

From evidence admitted against the objections and exceptions of the appellants, it appeared that shortly after the shipment of the oil Henkel & Company wrote a letter to the appellants, requesting payment, and that Mr. Billin, of the latter firm, replied to the effect that his partner, Huston, was then in Denver trying to collect from the railway company damages which the oil had sustained in transit, and that as soon as that was arranged, which would be in a few days, the appellees' bill would be settled.

This letter appears to have been read in evidence on trial in the county court, but having been since lost or mislaid, evidence of its contents was allowed to be introduced on the trial in the district court over objections and exceptions of the appellants, *inter alia*, that the loss of the original had not been proved.

On part of the appellants it was shown that the barrels were leaking badly when the oil reached Poncha Springs; that the members of the appellant firm were absent, having left their book-keeper, Alfred Darrow, in charge, who refused to receive the oil because it was leaking and not in marketable condition.

It was further shown that a Mr. Dunbaugh, a traveling salesman of the appellees, was at Poncha Springs after the arrival of the oil, and that Darrow proposed to him, that if he would haul and place the oil in the storehouse of Billin, Huston & Co., he would store it, and sell it for the appellees on commission. That Dunbaugh

replied that he would telegraph his firm for instructions, and until the same were received he could do nothing. That he did telegraph, and the firm answered to do nothing about the matter, and it does not appear that he took any further action.

The first instruction given by the court at the request of the plaintiffs was as follows:

First. "The court instructs the jury that if they believe, from the evidence, that the defendants, Billin, Huston & Co., purchased from the plaintiffs, Chas. Henkel & Co., twenty barrels of coal oil at the price of \$220.85, and directed the plaintiffs to deliver the said coal oil at the depot of the Denver & Rio Grande Railway, at the city of Pueblo, to be shipped to defendants, and that plaintiffs did so deliver the said coal oil in good order, and it was the quality agreed upon, at the said depot as directed by the defendants, and that the defendants have not paid the purchase price thereof, or any part thereof, then they should find for the plaintiffs such sum as you may find from the evidence to be due."

Mr. GEORGE R. ELDER, for appellants.

Messrs. J. Q. RICHMOND and M. B. BRADFORD, for appellees.

BECK, C. J. The statute of frauds being pleaded to the alleged contract for the sale of the oil, and no note or memorandum in writing of the contract having been made and subscribed by the parties, no part of the goods bargained for, or the evidence of some of them, having been accepted and received by the purchasers, nor any part of the purchase money paid at the time of the transaction, the contract of sale was within the statute and void by the express terms thereof when entered into. Gen. Laws, § 1262.

The first instruction given the jury by the court at the request of the appellees, plaintiffs below, was to the effect that full performance by the vendors of the terms and

conditions of the verbal contract of sale on their part to be observed and performed, entitled them to maintain their action and to judgment for the contract price of the goods sold.

If a void contract can be rendered valid by performance on the part of one party only, non-concurred in after performance by the other party, then this instruction is correct.

Such, however, is not the law. To render such contract valid, there must be performance on the part of the vendees as well; that is, they must not only receive, but accept the goods so bargained for.

Counsel for the appellees mistake the law in the first proposition of their brief, viz., that the case is controlled by the rule of law laid down in *Tarling v. Baxter*, 6 Barn. & Cress. 360: "That where there is an immediate sale and nothing remains to be done by the vendor, as between him and the vendee, the property in the thing sold vests in the vendee, and then all the consequences resulting from the vesting of the property follow, one of which is that if it be destroyed the loss falls on the vendee."

This rule has no application to a contract of sale falling within any of the nullifying provisions of the statute of frauds.

Counsel are likewise in error upon their main proposition, on which they rely for an affirmance of the judgment below, that the goods having been delivered to the carrier designated by the purchasers, and being of the quality, quantity and price agreed upon, this delivery was equivalent to an acceptance by the purchasers and vested the property in them.

One of the cases cited in support of the proposition is *Diversy v. Kellogg*, 44 Ill. 114. The nature of the case (but not of the contract, since no question is raised as to its validity) will sufficiently appear from the following extracts from the opinion:

"If appellee shipped, within a reasonable time, the

amount and quality of liquor sold to the appellant, in the manner directed, the property vested in the latter, and it was at his risk from the time it was shipped." * * *

"As soon as goods are delivered to a carrier, under a contract of sale, the title vests in the purchaser, subject to stoppage *in transitu*, but with no other lien, unless expressed in the terms of sale." * * * "If it was of a different quality from that purchased, he was not bound to accept it, but might, upon learning its quality, within a reasonable time, give notice that he declined to receive it, and thereby avoid liability."

Several cases can be cited to the same effect, as, for example, *Nichols v. Morse*, 100 Mass. 523, where the doctrine is announced, that in an action for goods sold and delivered, if the plaintiff proves a delivery at the place agreed upon, and that there remains nothing further for him to do, he need not show an acceptance by the defendant to maintain his action.

In none of this class of cases does it appear that any question arose or was considered involving the validity of the contract of sale under the statute of frauds. In cases where this question has arisen, a very different doctrine is announced. Thus in *Johnson v. Cuttle*, 105 Mass. 447, which was an action to recover the price of goods sold and delivered under an oral contract, and wherein it appeared that the plaintiff delivered to a certain carrier the goods ordered, in accordance with the express direction of the defendant, the court held that the price of the goods being more than \$50, and there being no memorandum in writing of the contract and no payment of purchase money, proof that defendant accepted and received the goods was required by the statute of frauds to make the contract valid.

The court further held that mere delivery is not sufficient, but there must be unequivocal proof of an acceptance and receipt by the buyer.

In the case before us counsel rely upon the point that

the vendors had done all required of them by the terms of the contract; that the goods shipped by them were of the quality, quantity and price agreed upon; that they were delivered to the carrier designated by the purchasers; that they were shipped in good condition, and that they had not been paid for.

Applied to a valid contract of sale, these allegations, if proven, would entitle the plaintiff to recover the price agreed upon. But that they are insufficient to authorize a recovery in a case like this is illustrated by the case of *Caulkins v. Hellman*, 47 N. Y. 449, which was an action brought to recover the value of a quantity of wine sold upon a verbal contract.

In that case the jury was instructed on the trial below, as a matter of law, "that if they were satisfied that the wine or any portion of it was actually delivered in pursuance of the verbal contract, that circumstance was sufficient to take the contract out of the statute of frauds, and the contract was a valid one and might be enforced, notwithstanding it was not in writing."

In respect to this instruction the court say: "It is evident that the learned judge applied to this case the rule, as to delivery, which would be applicable to a valid written contract of sale, but which is inapplicable where the contract is void by the statute of frauds."

The court held that in case of an oral contract, of the nature specified, there must be not only a delivery of the goods by the vendor, but a receipt and acceptance of them by the vendee, in order to pass title or make the vendee liable for the price, and that this acceptance must be voluntary and unconditional.

As between vendor and vendee, we are of opinion that the weight of authority sustains the foregoing principles. Browne on the Stat. of Frauds (3d ed.), sec. 327 *et seq.*; Benjamin on Sales, secs. 160, 181; 2 Schouler's Personal Property, pp. 485, 486.

The first instruction given by the court, on the prayer

of appellees, being in conflict with the views expressed, is held to be fatally erroneous.

It is also assigned for error that the court permitted the appellees to introduce parol proof of the contents of a certain letter, claimed to have been written them by the appellants, in reply to a letter of the appellees demanding payment of the oil shipped.

One of the objections made on the trial was, that the loss of the original had not been shown.

The rule of law governing the admission of such evidence, as announced by this court in *Bruns v. Clase* (*ante*, p. 225), is that, before secondary evidence can be given of an instrument in writing, there must be proof of a diligent and *bona fide*, but unsuccessful, search for such instrument, in the place where the same belongs, is generally kept, or most likely to be found.

The proof on this application fell far short of these requirements. Although two members of the appellees' firm, Duke and Henkel, were present at the trial and testified as witnesses in their own behalf, only one of them was interrogated as to the loss of this letter. He testified that his firm received the original letter. He was then asked: "Where is that letter?" *Ans.* "On file in the county court office. We had it there on the suits there." *Q.* "By an examination of the records can you find it?" *A.* "I have not been able to so far." *Q.* "That letter was filed in the records in this case?" *A.* "Yes, sir."

T. A. Sloane, sworn for the plaintiffs: *Q.* "State to the jury whether or not this letter has been on file in this case?" *A.* "It has not."

This was all the preliminary proof offered. The witness Duke was then recalled and permitted to testify as to the contents.

While there is no proof that the witness T. A. Sloane occupied any official position in either the county or district court, it is presumed he was clerk of the district

court, as the name of "Theo. A. Sloane" is signed as such to the transcript in this case. If this be true, then the only effect of his testimony is, that the letter was not transmitted to the district court with the papers sent up on the appeal from the county court.

What diligence the witness Duke used, or caused to be used, if any, in the examination of the papers on file in the office of the judge or clerk of the county court, we are not advised.

Again, the letter may have been withdrawn by another member of appellees' firm, by leave, and filed with other business letters in the office of the firm. This being the place where such letters belong, are usually kept, and most likely to be found, in addition to proof of a diligent and unsuccessful search of the papers on file in the county court, there should have been proof of a like search in the office of the appellees; but none whatever appears to have been made.

The evidence does not preclude the possibility of the original being within the knowledge or possession of another member of the appellees' firm; nor was it made to appear that either one of the other two members had made any search at all for it.

The evidence of the contents of this letter having been erroneously admitted, must be treated as though it was not in the case. For this reason, it is not proper for us to say how the issues would have been affected by such testimony.

By reason of the errors noted, and because sufficient evidence of a legal acceptance of the goods, in view of the plea of the statute of frauds, does not appear in the record, the judgment must be reversed.

Reversed.

SIMONTON AND OTHERS V. ROHM AND OTHERS.

Where a judgment has been rendered more than thirty days prior to the first day of the next term of the supreme court, appellant is not bound, under the act of 1885, to serve notice of appeal twenty days before such term, and file and docket the cause by the third day of such term, or procure an extension of the time for cause; he has the two months given by section 6 of the act within which to take his appeal.

Appeal from County Court of Eagle County.

MOTION to dismiss appeal.

Messrs. BROWN and GLENN, for appellees, *ex parte*.

PER CURIAM. This is a motion by the appellees to dismiss the appeal, on the ground that the appellants failed to comply with the requirements of sections 10 and 11 of the act of April 23, 1885, in relation to appeals to the supreme court. Laws 1885, p. 352.

These sections are as follows:

"Sec. 10. The notice of appeal must be served at least twenty days before the first day of the next term of the supreme court; provided, the judgment, or order appealed from was rendered not less than thirty days prior to the first day of such term. And the cause must be filed and docketed not later than the third day of such term, unless the court shall, for good cause shown, extend the time. If the appeal is taken less than twenty days before the term, it must be so filed and docketed before the next succeeding term.

"Sec. 11. If the appellant fails to file the transcript required above, and have the cause docketed, as provided in the preceding section, or fails to get the time extended by showing good cause for the delay, the appellee may file a certified copy of the judgment or order appealed from, and of the notice served on the clerk of the court below, and, on motion, have the appeal dismissed, or the judgment or order appealed from affirmed."

In the present instance, the judgment appealed from was rendered more than thirty days prior to the last regular term of this court, which was the April term thereof; and the failures alleged against the appellants are that they did not serve their notice of appeal at least twenty days before the first day of the April term, and that they neither had the cause filed and docketed by the third day of that term, nor procured an extension of the time therefor. Appellees now present a certified copy of the judgment appealed from, and the notice of appeal, as provided by section 11, and move that the appeal be dismissed, and the judgment of the county court be affirmed.

If the sections quoted contained all the provisions of the act bearing upon the right of appeal, and the time allowed within which this right may be exercised, we would be compelled to sustain this motion and dismiss the appeal. But a previous section (section 6) provides that "Appeals from the district, county and superior courts may be taken to the supreme court at any time within two months from the rendition of the judgment or order appealed from, and not afterwards." While there is a seeming conflict in the provisions of these several sections, yet they are not irreconcilable, and they are capable of a construction that will enable this court to give effect to the evident purpose and intent of the legislature. The provisions of the act being thus construed, section 6 gives to all litigants entitled to appeal two months from the rendering of the judgment or order appealed from within which to perfect their appeals; but they may perfect the same in a shorter period of time, if they desire to do so, and thereby, in some cases, make the appeal returnable at an earlier term of this court.

The provisions of section 10 determine the term of court to which appeals are returnable. When the judgment is rendered thirty days prior to a regular term of the supreme court, and the notice of appeal is served

twenty days before such term, a transcript of the judgment or order appealed from, together with the notice of appeal, must be filed in this court, and the cause docketed, not later than the third day of such term, unless the time therefor be extended by the court. But the fact that a term of this court occurs thirty days after the rendition of a judgment was evidently not intended to curtail the full time, prescribed by section 6, within which an appeal may be perfected. The full time allowed by the statute may be taken, at the option of the appellant.

The motion to dismiss is denied, and the cause ordered to be stricken from the docket.

Motion denied.

DECEMBER TERM, 1886.

THE PEOPLE EX REL. SEELEY V. MAY, TREASURER.

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13	324
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1a	374
1a	387
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24	129
9	404
29	458

1. The limitation imposed upon county indebtedness by section 6, article XI, of the constitution, includes debts incurred by operation of law as well as those arising from express contracts.
2. This constitutional provision deals with indebtedness that springs from express or implied contracts, and not with involuntary liability arising *ex delicto*.
3. The constitutional inhibition applies only to indebtedness; that instrument does not limit county authorities in the levy of taxes for county purposes.
4. Though a municipal corporation be indebted to the constitutional limit, valid appropriations of its revenue may be made in anticipation of the collection thereof to meet the ordinary expenses of the current fiscal year.
5. But such appropriations can only be made by orders upon the incoming revenue, given and accepted as payment; the effect of the transaction must be that of an assignment without recourse.
6. Under the funding statute the county authorities may provide for warrants previously presented to the treasurer for payment and duly registered, constituting valid debts, and thus be enabled to use all of the current general revenue in discharging the current expenses.

Mandamus to Treasurer of Lake County.

THIS case is now considered by the court on the pleadings for the third time. It was first presented upon a demurrer to the original petition (*People v. May*, 8 Colo. 485); it was again submitted upon a demurrer to the answer (*People v. May*, ante, p. 80), while the present discussion takes place upon a demurrer to the replication. At each of these stages of pleading different questions have been submitted, examined and adjudicated.

Aside from the omission of section 6, article 11, of the state constitution in full, the present opinion sufficiently recites the facts. This section gives rise to the questions now determined. It reads as follows: "No county shall contract any debt by loan in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges; and such indebtedness, contracted in any one year, shall not exceed the rates upon the taxable property in such county, following, to wit: Counties in which the assessed valuation of taxable property shall exceed five millions of dollars, one dollar and fifty cents on each thousand dollars thereof; counties in which such valuation shall be less than five millions of dollars, three dollars on each thousand dollars thereof. And the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above herein limited, unless when in manner provided by law the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debts so contracted

shall not at any time exceed twice the rate upon the valuation last herein mentioned; provided, that this section shall not apply to counties having a valuation of less than one million of dollars."

Messrs. TELLER and ORAHOD and MARKHAM and DIL-
LON, for petitioner.

Mr. D. E. PARKS, County Attorney of Lake County,
and Mr. H. B. JOHNSON, for respondent.

HELM, J. Under the replication, and the demurrer thereto, counsel argue and submit for adjudication the following questions, viz.: *First*, does the limitation imposed upon county indebtedness by section 6, article 11, of the state constitution, include debts contracted by operation of law? *Second*, can counties which have reached the constitutional limit of indebtedness, and have issued warrants in excess thereof, meet their current expenses as they arise by assignments of the annual revenue (thus appropriating the whole of such revenue, if necessary) accruing from taxes levied, but uncollected?

I. The section of the constitution above mentioned was, at a former stage of the pleading in the case at bar, carefully considered by this court. *People v. May, ante*, p. 80. It was then held that the expression in said section, "and the aggregate amount of indebtedness of any county for all purposes * * * shall not at any time exceed twice the amount above herein limited, unless," etc., operates as a "plain limitation of county indebtedness, irrespective of its form." Counsel for petitioner were at that time contending that this limitation applies only to debts contracted "by loan." Treating our opinion as decisive against that particular construction of the language in question, they now ask us to say that the inhibition reaches such debts only as are the result of voluntary contracts made by the county authorities. They seek to have us distinguish between the *purpose* for

which a debt is created and the *manner* of its creation. In other words, if we rightly understand their position, they assert that, as between two items of county expenditure which are equally necessary, the constitutional limitation of indebtedness having been reached, a debt created for one by the voluntary contract of the commissioners would, conceding the correctness of our former opinion, be forbidden and void, while a debt in connection with the other, directly resulting from action under legislative enactment, might be perfectly valid.

Should the position of counsel be sustained? The phrase "for all purposes" seems to include debts without regard to the method of their contraction. The language itself does not discriminate between purposes governing *legislative action*, and purposes controlling the conduct of *county authorities*. It apparently covers every kind of indebtedness, voluntarily authorized or voluntarily contracted. Whether the same be incurred in one way or another, whether created for what may be termed necessary running expenses, or in the consummation of other legitimate municipal objects, the inhibition appears to be equally applicable. The constitutional limitation having been reached, a debt for the statutory fee of an officer, or a statutory liability in connection with any other municipal employment or expense, is apparently as much inhibited as is indebtedness for labor performed or materials furnished under contract with the commissioners. Such we say is, in our view, the plain import of the language referred to. And, unless the same section or other sections of the constitution contain provisions inconsistent with this view, or unless there exist some objection so cogent as to demonstrate that the framers of the constitution could not have foreseen and intended such a construction, its adoption becomes a legal necessity.

We shall consider briefly the principal reasons advanced by counsel for petitioner to support their views in the premises. We preface such consideration, however,

with the suggestion that all debts binding upon counties are authorized by law. The county authorities exercise no power that is not conferred by the constitution or by the legislature. They make no municipal contract, and incur no municipal liability, that does not find its warrant, directly or indirectly, in express legislative or constitutional enactment. Any action on their part which is not thus sanctioned would be *ultra vires*, and of no binding force as against the corporation. Hence it may truly be said that debts arising from express contract with the county commissioners are indirectly incurred by operation of law.

In the first place, we are told that such a construction of the provision in question as the one suggested would produce conflicts between different parts of the constitution itself; that since this construction of section 6 disables certain counties from incurring debts for the payment of officers' fees, and other necessary running expenses, the business of such counties will not be efficiently transacted, and they will, to a great extent, be shorn of their usefulness. Thus, say counsel, the beneficent constitutional provisions relating to county organization and government will, as to certain counties, be largely, if not completely, neutralized. The argument *ab inconvenienti* is also appealed to; and the serious public disasters that would result from the stoppage of the wheels of county government, because of the inability to incur debts, are strongly depicted.

If there were room in the language before us for judicial construction, and if counsel's assumptions were true, these arguments would receive great consideration. But the validity of the constitutional provisions to which counsel refer does not depend upon the ability of counties to create indebtedness; nor do the apprehended consequences necessarily follow from the inhibition against further liability. The constitutional provision before us simply prohibits "indebtedness" beyond a certain sum.

It does not limit the amount of *taxes* the county authorities shall levy to defray county charges for a given year. The members of the constitutional convention were not dealing with the subject of county expenses or expenditures, provided the county "pays as it goes." Their purpose was to protect the municipal credit, and to relieve the people of the oppressive burdens that always result from a large corporate indebtedness. If the running expenses are necessarily heavy, or if the people are inclined to extravagance, and indulge in what might be termed municipal luxuries, still the credit remains good, and the evils against which the convention legislated do not exist, provided these expenses, whether necessary or unnecessary, economical or extravagant, are paid when incurred. This provision, using the language of Mr. Justice ELBERT (*People v. May*, 'supra'), "is simply a declaration that the county, within certain limits, shall live within its income, and not that its income shall be more or less." So far, therefore, as the constitution is concerned, without the privilege of incurring further indebtedness, sufficient funds may be raised for the payment of all current county expenses. We shall presently see that these funds can be thus applied, and hence that, regardless of indebtedness, all county business may be transacted as usual.

In this connection the case of *Potter v. Douglass*, 87 Mo. 239, relied upon by counsel, should perhaps be noticed. Important differences exist, in regard to the subject under consideration, between the constitutions of Missouri and Colorado. These differences are perhaps sufficient to justify the weight given in that case to the argument *ab inconvenienti*, which is the principal ground of the decision. But had the court been construing constitutional provisions precisely the same as our own, and had they held that debts contracted by operation of law were not within the limitation, we should decline to accept their position as controlling.

We are urged to again consider the effect of legislative and executive interpretation. This subject was discussed at some length in the opinion filed when the cause was submitted upon the demurrer and answer. To the views then expressed we shall add but a single suggestion. We may accede to counsel's request and apply the rule which gives significance to such construction, notwithstanding the apparent clearness of the language under discussion, and we may allow proper weight to such action of the legislature and the county officers as can justly be deemed interpretation by them adverse to our views; yet, after so doing, the considerations upon which we rely are not overcome and our conclusion remains unchanged.

It may be true, as counsel contend, that a judgment for damages against a county, growing out of the negligent or tortious conduct of its officers or agents, constitutes a liability regardless of its indebtedness. Such is the view taken, under a constitutional provision substantially similar in this regard, by the supreme court of Illinois. *Bloomington v. Perdue*, 99 Ill. 329. But this fact does not sustain the position urged upon us. It is clear that the language under consideration deals with indebtedness that is reasonably anticipated as a result of voluntary action by the legislature or county authorities—such indebtedness as springs from express or implied contracts. Involuntary liability, arising *ex delicto*, is a subject that is not contemplated by the provision.

In conclusion upon this branch of the case, we may inquire, Why should the constitutional convention have intentionally left unrestricted the amount of county indebtedness that might arise *by operation of law*? Experience had demonstrated, and the members of the convention knew, that through such an opportunity the wise purpose of the provision would be largely evaded. If there were no control of legislative discretion in the passing of laws which might operate to create county indebtedness, it is plain that the great evil under consider-

ation by the convention would be but imperfectly avoided. In view of the language used here as elsewhere in the constitution, we cannot suppose that, while the convention distrusted the wisdom of county authorities in the matter, they had unbounded confidence in the judgment of the legislature. A limitation of county indebtedness, binding upon the legislature as well as the county authorities, was only a reasonable and a wise precaution.

II. We now turn our attention to the second question stated at the beginning of this opinion. As already suggested, the constitution does not limit the power of county authorities in connection with the levy of taxes for county purposes. The maximum amount to be thus raised is a subject left to the discretion of the legislature. That body has fixed a maximum rate, which is, in its judgment, amply sufficient to meet all reasonable current expenses. Should the limit thus named, however, prove inadequate for this purpose, it is to be presumed the legislature will hasten to make the necessary increase. Hence there can be no real ground for the apprehension of great inconvenience, provided the annual income from taxes can be used in defraying the annual expenses. Upon this subject we entertain no serious doubt. It is, we think, a sound doctrine that, though a municipal corporation be indebted to the constitutional limit, valid appropriations of its revenue may be made, in anticipation of the collection thereof, to meet the ordinary expenses of the current fiscal year. *Grant v. City of Davenport*, 36 Iowa, 399; *State v. Medbery*, 7 Ohio St. 531; *Fuller v. Heath*, 89 Ill. 296; *State v. McCauley*, 15 Cal. 455; *Law v. People*, 87 Ill. 400; *Koppikus v. State Capitol Com'rs*, 16 Cal. 253; *People v. Pacheco*, 27 Cal. 207; *City of Springfield v. Edwards*, 84 Ill. 626.

These cases, it will be observed by inspection thereof, do not discuss the subject with reference to counties. But the constitutional provisions construed are substantially similar in this respect to the one before us, and we

have no hesitancy in applying the foregoing principle to such municipalities in Colorado.

There can be no *legal indebtedness* beyond the constitutional limit. After such limit is reached, therefore, warrants or other instruments representing supposed municipal liability are of no *legal* force or effect. The annual taxes cannot be collected at the beginning of the fiscal year, and hence necessary labor or materials can, in certain counties, seldom be paid for in cash when furnished. Therefore the question is, how shall the cost of such labor or materials be discharged without money in the treasury, and without incurring indebtedness? Upon this question the cases are not fully in accord. We shall leave counsel to examine for themselves the various decisions that have been rendered in other states, and proceed to give briefly *our* conclusions upon the subject.

If the written assignment of a portion of the incoming revenue be accepted *as payment in full* for labor or materials furnished to the county, no debt is incurred. Using the language of a decision cited above, "one thing is simply exchanged for another." Since, in such case, the assignee takes all the risk if the taxes are not collected, relying simply upon his right to compel the proper officers to perform their duty in the premises, no liability, contingent or otherwise, attaches to the county. But the taxes from which the revenue assigned is to accrue must have been levied previous to such assignment. It is a plain legal as well as business principle that no valid assignment can take the place of a fund that has no existence either in fact or in law. When appropriations of the kind above mentioned have been made of revenue to accrue from taxes previously levied, the sum thus appropriated is in legal contemplation already collected. *Grant v. Davenport, supra; Law v. People, supra.*

It is hardly necessary to remark that assignments made in *excess* of the amount covered by the annual levy would be clearly illegal.

Counties may provide, under the funding statute, for the payment of all outstanding orders constituting a legal indebtedness. Such an indebtedness, therefore, when thus disposed of, does not interfere with the use of the current *general* revenue to defray the current expenses. And counties, in all cases, have the power to so adjust their affairs that valid warrants may issue in payment of such expenses as they accrue, provided, of course, that the transactions accord with the foregoing views regarding the creation of debts. We discover no constitutional objection to the county's securing a sum of money, in anticipation of such expenses, with which to defray them when incurred, the power so to do being previously conferred by statute, if the essential condition be complied with; that is to say, if the party advancing the money accept the county's assignment of uncollected revenue as *payment in full*. In such case there is still simply an "exchange of one thing for another." A part of the anticipated revenue is exchanged for *money*, instead of labor or materials.

But, whatever form the particular transaction may take, its effect must be that of an assignment *pro tanto*, without recourse, by the county, of the fund to accrue from the current levy of taxes, and the warrant or instrument of assignment must be expressly made payable out of the incoming revenue for the current year. Since all persons must know the law, it is not absolutely necessary that the assignment should state on its face that it is accepted in full satisfaction of the claim on account of which it is given, and that no liability is incurred by the county because of its issue. The instrument issues, is accepted, and must be construed, as though all constitutional and statutory provisions bearing upon its legality were expressly set out among its written or printed terms and conditions. *Fuller v. Heath, supra*.

The warrant now in controversy was issued after the constitutional limit of indebtedness had been reached by

the county. It is general in form. It does not purport to be payable from any particular fund, or out of the revenue from the taxes of any specified year. Nor do counsel claim, in the pleadings or argument, that, when the instrument issued, it was the intention to restrict in any manner the county's liability for the supposed indebtedness represented thereby. This warrant cannot be treated as an assignment under the views herein expressed.

The demurrer to the replication must therefore be sustained.

Demurrer sustained.

THE PEOPLE EX REL. SEELEY V. MAY, TREASURER.

1. The case of *Potter v. Douglass*, relied upon by the petitioner, construes constitutional provisions which limit the amount of *taxation* as well as of indebtedness.
2. Judgments obtained upon void warrants by reason of a failure to plead the constitutional limitation, have, in some instances, been protected where collaterally attacked, upon the proposition that the question of the validity of such warrants was *res adjudicata*.

Petition for rehearing.

PER CURIAM. We have carefully reconsidered all the matters in this case from the beginning. We have re-examined the views expressed in the several opinions rendered and the authorities by which they are sustained. We have carefully and candidly considered the objections thereto made by counsel, and feel called upon to adhere to the doctrine announced without change or modification, as the only true interpretation of the constitutional provision involved, and as unanswerably supported by both reason and authority.

Misstatements, or at least misconception, of our position require us to notice:

- (1) One of the differences between our constitution

and the constitution of Missouri, discussed in the original arguments and alluded to in the opinion of Justice HELM, is that the constitution of Missouri, unlike ours, limits *taxation* as well as indebtedness.

(2) We are not to be understood as deciding in advance the legal *status* of a judgment obtained upon void warrants by reason of a failure to plead the constitutional limitation. Where such a judgment has been sustained, it has been upon the proposition that the question of the validity of the warrants upon which it was founded was *res adjudicata*, and no longer the subject of inquiry.

We do not care to further notice or fully characterize the argument of counsel on the petition for rehearing. It is sufficient to say that it misquotes the language, misrepresents the views, and misstates the positions of the court. Its language is intemperate and its spirit unworthy. We order it stricken from our files as dishonoring them and its author.

The petition for rehearing is denied.

CITY OF BOULDER V. NILES.

1. Cities and towns incorporated under Gen. St. ch. 109, p. 958, are invested with exclusive control over their streets, and come within the rule which holds such cities and towns liable for damages caused by a failure to keep their streets in a safe condition for travel, whether such liability is specifically imposed by the act of incorporation or not.
2. In an action against a city to recover damages for a personal injury received by the plaintiff by falling on the defendant's sidewalk, owing to the negligence of defendant in not removing ice and snow which had formed a ridge thereon, the question whether the defendant should have known of such obstruction, and removed it, is one for the jury to determine from all the circumstances,—the extent of the snow-fall, condition of the weather thereafter, amount of travel on the street, and the lapse of time between the snow-fall and the accident.

9	415
18	14
9	415
6a	282
9	415
23	81
9	415
15a	31
15a	32
9	415
28	185
29	584
16a	64
9	415
17a	70
17a	73
17a	175
18a	145
9	415
110a	171

3. In such case, an instruction which states that, if the jury believe that plaintiff was injured owing to the negligence of the defendant in not removing an obstruction on its sidewalk which plaintiff may have proven was there, they may find for plaintiff, is erroneous, in that it does not require them to find that plaintiff was using ordinary care in walking on such sidewalk; and the fact that the law on the subject was correctly given in another instruction is not material, as it cannot be known by which instruction the jury was governed.
4. In order to hold a city liable for an injury received by falling over an obstruction on its sidewalk, it must be shown, not only that there was such an obstruction, and that plaintiff was injured thereby, as alleged, without negligence on his part, but also that defendant had notice of such obstruction, or that it had existed for such a length of time as to import notice; and that defendant had not used reasonable diligence in removing such obstruction.

Appeal from District Court of Boulder County.

THIS action was brought in the court below by the appellee, Niles, against the defendant city to recover damages for injuries resulting from a fall upon snow and ice accumulated upon defendant's sidewalk. The accident happened to the plaintiff upon the evening of the 6th of February, while walking, after dark, upon Pine street. The obstruction upon which the plaintiff slipped and fell was an accumulation of snow and ice forming a ridge near the center of the sidewalk, according to the testimony of the plaintiff, nearly a foot in height, oval in shape, and about two feet wide at the base, and extended for quite a distance along the center of the sidewalk. Upon either side of the ridge the sidewalk had been cleared from the snow and ice by the witness Temple, the owner of the abutting premises. According to the testimony of a number of other witnesses, the ridge was not more than three or four inches in height. It was the bottom of an original path trodden in the snow after the storm, and took the shape of a ridge, or, as some witnesses call it, "a core," after the snow on either side had been removed. While the plaintiff knew gen-

erally of the slippery and unsafe condition of the streets and sidewalks resulting from the snow-storm, he denied all knowledge of the particular obstruction on which he slipped and fell. He appears to have been walking at an ordinary pace, and says he was looking ahead of him at the sidewalk, but did not see the obstruction. His injuries were such as to incapacitate him for work for several months, and to cause him great suffering and pain. The snow-storm commenced on the 30th of January, and lasted three days. The snow fell to a depth of about two and one-half feet. The testimony of the street commissioners of the defendant city, showing the heavy snow-fall, and the general condition of the streets and sidewalks, and want of notice of the obstruction which caused the injury, is given in the opinion of the court.

The fourth and fifth instructions, to which the opinion of the court refers, are as follows:

“Fourth. The court instructs you that, if the jury believe from the evidence that on or about the 6th or 7th of February, 1883, there was an obstruction on the sidewalk on Pine street, at or near the place alleged by plaintiff, and that the plaintiff, in walking on said sidewalk, stumbled over said obstruction, and fell, without fault or negligence on his part, and was injured by reason thereof, and was thereby crippled or injured, not knowing that said obstruction was there at the time, the defendant is liable to the plaintiff in damages for the full amount of all the injuries plaintiff has proven he has sustained thereby.

“Fifth. That if the jury believe, from the evidence, the plaintiff has been injured in person, arising from the negligence of defendant, by not removing any obstruction on the sidewalk which plaintiff may have proven was on it at the time the injury was sustained, the jury have the right to take into consideration, as compensation therefor, the loss of time plaintiff has sustained by his inability to labor, his doctor bills, expenses for medi-

cines, and expenses incurred, if any, for services for nursing and attention, and for the pain and suffering in mind and body which the plaintiff may have proven he endured. It is also the duty of the jury to take into consideration any permanent disability the plaintiff may have proven he received, and his diminution of power to earn money in the future."

The jury found for the plaintiff, and assessed his damages at \$650.

Mr. O. F. A. GREENE, for appellant.

Messrs. G. BERKLEY, M. B. CAMPLIN and E. B. KELLOGG, for appellee.

ELBERT, J. The subject of the implied liability of municipal corporations, in civil actions, for misconduct or negligence on their part, or on the part of their officers, in respect to corporate duties resulting in injuries to individuals, is very fully and ably discussed by Chief Justice BECK, in the case of *City of Denver v. Dunsmore*, 7 Colo. 339. The conclusion reached is as follows: "The general current of authority supports the view that when municipal corporations are invested with exclusive authority and control over the streets and bridges within their corporate limits, with ample power of raising money for their construction, improvement and repair, a duty arises to the public, from the nature of the powers granted, to keep the avenues of travel within such jurisdiction in a reasonably safe condition for the ordinary mode of use to which they are subjected, and a corresponding liability rests upon the corporation to respond in damages to those injured by neglect to perform the duty; that the same rule obtains in such case whether the duty is specifically imposed by the act of incorporation or not. This duty is municipal or ministerial, and not governmental."

The powers granted to cities and towns incorporated,

as was the defendant city, under chapter 109, Gen. St. p. 958, bring them, as municipal corporations, within the rule announced. This disposes of the leading question discussed by counsel for the appellant.

The claim in this case is that the neglect of the defendant city to remove from the sidewalk on one of its streets the accumulations of snow and ice upon which the plaintiff slipped and fell, renders it liable in damages for the injuries to the plaintiff resulting from the fall. It may be said, generally, that the duty imposed upon municipal corporations in respect to its sidewalks is a duty to keep them in a reasonably safe condition. Upon persons using the sidewalks the duty imposed is that of ordinary care. Under conditions of increased danger, there is imposed a duty of increased care. These are general principles to be understood and applied in the light of the circumstances of each particular case.

Mr. Dillon, in his work on Municipal Corporations (section 1006), sums up the law applicable to this class of cases as follows: "The law does not require a municipal corporation to respond in damages for every injury that may be received on a public street. Before a recovery can be had, it must appear, upon the whole testimony, that the person injured used, under all the circumstances, ordinary care to avoid danger; nor is the corporation required to have its sidewalks so constructed as to secure absolute immunity from danger in using them; nor is it bound to employ the utmost care and exertion to that end. Its duty, generally stated, is only to see that its sidewalks are reasonably safe for persons exercising ordinary care and prudence. *The mere slipperiness of a sidewalk*, occasioned by ice or snow, not being accumulated so as to constitute an obstruction, is not ordinarily such a defect as will make the city liable for damages occasioned thereby. Where there is snow upon a sidewalk, and it is rendered slippery, there is danger of injury from slipping and falling even on the best constructed walks. At such times

there is imposed upon foot travelers the necessity of exercising increased care; and, where the city uses reasonable diligence, it will not be liable. But in case no attempt is made to remedy an unsafe sidewalk, and the weather is such that it could easily have been done, liability may attach."

It is also to be borne in mind that where the action, as in this case, is based on neglect or omission to keep the sidewalk in a safe condition, that the question of notice becomes of importance. The rule is that notice to the corporation of the defect which caused the injury, or facts from which notice thereof may reasonably be inferred, or proof of circumstances from which it appears that the defect ought to have been known and remedied by it, is essential to liability. The corporation is responsible only for reasonable diligence to repair the defect, or prevent accidents after the unsafe condition of the streets is known, or ought to have been known to it, or to its officers having authority to act respecting it. 2 Dill. Mun. Corp. § 1020 *et seq.*

After a careful examination of the record, we are unable to say that the law applicable to the facts of this case was fully and fairly given to the jury by the instructions of the court. The fourth instruction given for the plaintiff is defective in this: that it ignores the question as to whether or not the defendant city used reasonable diligence in the care of its sidewalks. Notice of the obstruction, or such lapse of time as imports notice, and failure to use reasonable diligence in its removal, were essential conditions of the defendant's liability. The instruction we are considering left the jury at liberty to find the defendant liable without reference to these leading questions.

The snow-storm continued for three days from the 30th day of January. The snow fell about two feet. The accident was on the evening of the 6th of February. There is no evidence that the defendant had actual notice

of the obstruction. On the other hand, Mr. Newton testifies as follows: "I have been street commissioner of the city of Boulder for the last year and a half, and, as such street commissioner, I have had control of the streets of Boulder. I recollect that stormy weather that has been testified to — the last of January and the first of February. Those storms left the sidewalks in a bad condition. The snow was deep on those sidewalks. At that time it was not possible, with ordinary effort or care, to have kept the walks clean throughout the city, the snow was so deep. It was unusually stormy weather for Colorado. *I never had any notice of any obstruction* in front of Mr. Temple's."

Whether or not, under all the circumstances, the defendant, through its officers, should have known of the obstruction and removed it, was a question for the jury. In determining this question, the extent of the snow-fall, the condition of the weather thereafter, the location of the street where the obstruction was, as a public way, more or less frequented, the lapse of time between the snow-fall and the accident, were all matters to be considered by them. If, in point of fact, the proper officers of the defendant city did not know of such obstruction when, by ordinary and due diligence and care, they ought to have known of it and removed it, the defendant must be held responsible as in case of actual notice.

The fifth instruction is also objectionable, in that it ignores the essential element of ordinary care on the part of the plaintiff, and assumes his right to recover without reference to it.

That other instructions given on behalf of the defendant to some extent laid down the law correctly is not material. We cannot determine by which instruction the jury was governed. It is enough for us to know that error may have intervened. *City of Denver v. Capelli*, 4 Colo. 28; *Claire v. People*, ante, p. 122.

The other assignments need not be noticed. For the reasons above given the judgment of the court below must be reversed and the cause remanded for a new trial.

Reversed.

9	422
20	928
9	422
31	268
9	422
24	449
9	422
32	234
9	422
34	161

PEOPLE EX REL. THOMAS, ATTORNEY-GENERAL, V. SCOTT,
COUNTY CLERK OF ARAPAHOE COUNTY.

1. Under the constitution of this state (art. 10, § 11), providing that, when the assessed value of property in the state shall have reached \$100,000,000, the tax for "state purposes" shall not exceed four mills per dollar of valuation, rates of taxation for state purposes aggregating five and seventeen-thirtieths mills per dollar, declared after the assessed value of property in the state had reached \$100,000,000, are in excess of the constitutional limit, although only four mills thereof is declared to be for state purposes, and the remainder is for the support of state institutions authorized by the constitution.
2. Any legitimate expenditure of the state, necessary to be provided for by a state tax, is a "state purpose," and the tax to be provided is a tax for a "state purpose."
3. The act of April 7, 1885, declaring a tax of four mills for state purposes, does not repeal by implication Gen. St. §§ 15, 2243, 2444, 2881, 3108, 3167, 3456, declaring rates of taxation for various state institutions, but those rates should be extended in separate columns of the tax list, and deducted from the aggregate rate of four mills, and the remainder of that rate extended in the column of the list in which assessments for taxes to be applied to the expenses of the state government are placed.
4. Constitutions are adopted as a whole, and it is a rule of construction that a clause which, standing by itself, might seem of doubtful import, may be made plain by comparison with other sections of the same instrument.
5. Legal presumptions are in favor of the correctness of contemporaneous legislative expositions of a constitutional provision, but such construction can never abrogate the text, it can never narrow its true limitations, nor enlarge its natural boundaries.

THIS is an original proceeding instituted in the supreme court for a writ of *mandamus* to compel the county clerk of Arapahoe county to extend on the tax list of

said county, for the year 1886, certain taxes in conformity with a notice sent him by the state auditor. The petition is presented by the attorney-general, and states as grounds of application:

“That on the 16th day of August, A. D. 1886, at a regular meeting of the state board of equalization, the said board ordered a tax levy of four mills on each dollar of valuation for state purposes; that on the 30th day of August, A. D. 1886, the state auditor sent to, and the defendant received, the following notice, to wit:

“ ‘OFFICE OF AUDITOR OF STATE.

“ ‘DENVER, August 30, 1886.

“ ‘*Hon. Charles H. Scott, Clerk of Arapahoe County* —
DEAR SIR: At a regular meeting of the state board of equalization, held August 16, 1886, the following tax was ordered levied for the year 1886: For state purposes, four mills on the dollar. The following taxes are levied by acts of the general assembly, viz.: For mute and blind, one-fifth mill on the dollar (sec. 2444, Gen. St.); for university, one-fifth mill on the dollar (sec. 3456, Gen. St.); for agricultural college, one-fifth mill on the dollar (sec. 15, Gen. St.); for insane asylum, one-fifth mill on the dollar (sec. 2243, Gen. St.); for school of mines, one-fifth mill on the dollar (sec. 3108, Gen. St.); for stock inspection, one-fifteenth mill on the dollar (sec. 3167, Gen. St.); for capitol building, one-half mill on the dollar (sec. 2881, Gen. St.); for military poll, one dollar upon each male inhabitant of your county not exempt by law (Sess. Laws 1885, p. 269). The above rates will be charged against your county on the grand total of abstract of assessment, as certified by you to this office.

“ ‘Very respectfully,

“ ‘HIRAM A. SPRUANCE, Auditor of State.’

“That upon the receipt of said notice it became and was the duty of the defendant, as county clerk of Arapahoe county, in making up the tax list, to compute and carry out in the proper column the state tax at four mills

on the dollar of valuation; that it became and was the further duty of the defendant, as such clerk of Arapahoe county, in making up the tax list for the year A. D. 1886, to combine under one head upon the tax list, under the head of 'State Institutions,' in one column, the following taxes: For mute and blind, one-fifth mill on the dollar; for university, one-fifth mill on the dollar; for agricultural college, one-fifth mill on the dollar; for school of mines, one-fifth mill on the dollar; for insane asylum, one-fifth mill on the dollar; for stock inspection, one-fifteenth mill on the dollar; for capitol building, one-half mill on the dollar."

The petitioner then avers the extension of the *four-mill* rate for state purposes by the respondent, and his refusal to extend the rates levied by acts of the general assembly for the support of the state institutions, and for the capitol building fund.

The answer of the respondent denies the power or authority of the state board of equalization to order the tax levy mentioned in the notice, averring, upon the advice of counsel, that the only power vested in said board with respect to a tax levy at said meeting was to reduce the rate fixed by statute for state purposes. Respondent denies that he has neglected or refused to extend upon the tax list the rates prescribed by law for the several state institutions, but avers the extension of the same in the manner required, and admits that, in making up the tax list for the year 1886, he only extended four mills on the dollar of valuation *for all state purposes*, and state institutions included. The answer then sets up, in defense of the course pursued by the respondent, in this behalf, and as further cause why a writ of *mandamus* should not be issued against him, that in the year 1886 the taxable property within the state amounted to more than \$100,000,000, and that section 11 of article 10 of the state constitution provides that "the rate of taxation on property, for state purposes, shall never exceed six

mills on each dollar of valuation; and, whenever the taxable property within the state shall amount to one hundred million dollars, the rate shall not exceed four mills on each dollar of valuation." The answer further avers that the rate of taxation for all state purposes, including the support of state institutions, for the year 1886, is limited by the constitution to *four* mills, and that, in so far as any statute provides for or levies a greater rate, it is null and void.

To this answer the attorney-general demurs on the ground of insufficiency to constitute a defense to the application.

T. H. THOMAS, Attorney-General, for the People.

Messrs. WM. B. MILLS, County Attorney, and SULLIVAN and MAY, for respondent.

BECK, C. J. We deem it unnecessary, for the purposes of the present case, to discuss the powers of the state board of equalization, for the reason that it appears from an examination of the laws in force levying state taxes that all the levies sought to be enforced by the peremptory writ prayed for were made by the legislature, and not by the state board of equalization. It is averred in the petition that the four-mill rate for state purposes was levied by the state board of equalization, but these taxes were in fact levied by the fifth general assembly, and no change in the rate so prescribed was made by the state board. Laws 1885, p. 318, § 3. The same is also true of the rates levied for the support of the state institutions. A separate act was passed in each instance, fixing a rate to be levied annually, on all taxable property within the state for the support of each of these institutions. Some of these laws were enacted at the first session of the general assembly of the state, and some at later sessions thereof, but all prior to the session of 1885. These laws remain in force, and must be re-

garded as standing levies of the rates prescribed, and as authorizing an extension of the taxes therein provided for. 1 Desty, Tax'n, 468; *Davis v. Brace*, 82 Ill. 542. The legislature has so regarded these levies, as appears from amendments made to some of the acts fixing the same; and while they were understood to be levies for legitimate state expenses, and duly authorized by the constitution, yet they were evidently not understood to be covered and included in the constitutional provision which limited the rate of taxation "for state purposes." This is shown by the whole course of legislation bearing on the subject.

At every regular session of the legislature since the adoption of the state constitution, a rate of taxation has been prescribed "for state purposes." In the same section of these several acts, up to and including the year 1883, the county clerk of each county has been required to extend these taxes in a separate column of his tax list. The language of these several acts is as follows: "The county clerk of each county, in making up the tax list required by this act, shall compute and carry out, in the proper column, a state tax at the rate aforesaid." Laws 1877, p. 756, § 44; Laws 1879, p. 152, § 1; Laws 1881, p. 208, § 1; Laws 1883, p. 247, § 1. The amendment of April 7, 1885, adopts the same provision, by reference to section 70, Gen. St. (Laws 1885, p. 318, § 3).

The form of the first tax list prescribed by the legislature exhibits the same intent. It provides a column for state taxes, one for deaf-mute tax, and indicates, by a blank column and foot-note, an intent that other columns are to be added for other special state levies. Gen. Laws, p. 758. By the first section of an act approved February 4, 1876, which is still in force, it was provided that "all taxes for state institutions in each year shall be combined under one head, and entered by the clerk of each county of this state upon the tax list, under the head of 'State Institutions,' in one column." Gen. St. p. 837, § 2868.

That it was the legislative intent to make separate provisions for the support of the state institutions from that provided for defraying the expenses of the different departments of the state government is further shown by the acts of 1881 and 1883, above cited. The first provides "that for the years 1881 and 1882, the rate of taxation shall be, *for state purposes*, four mills on the dollar, and for the purpose of establishing a fund for a capitol building, one-half of one mill on the dollar, unless the state board of equalization shall fix a lower rate." Laws 1881, p. 208. The act of 1883 provides "that for the years of 1883 and 1884, and annually thereafter, the rate of taxation shall, *for state purposes*, be three and one-half mills on the dollar, and for the purpose of establishing a fund for a capitol building, one-half of one mill on the dollar, unless the state board of equalization shall fix a lower rate." Laws 1883, p. 247. The capitol fund, in these acts provided for, has no reference to the "interest fund," or the "capitol sinking fund," provided for by the act of February 11, 1883. The understanding of the legislature that the *rates* levied for the state institutions should be in addition to the rate levied for the so-called *state purposes*, and that they should be separately extended on the tax rolls, is still further apparent from the language of sections 1 and 3 of the act approved February 12, 1881. Section 1 provides "that in all cases wherein county clerks have failed, from any cause whatever, in whole or in part, to compute and extend the taxes on the county tax rolls for the years 1879 and 1880, for the mute and blind institute, state university, agricultural college, school of mines, insane asylum, and military poll funds, according to the levies fixed by law for these several purposes, the county commissioners of any such county are hereby authorized and required to cause such deficiency to be paid into the state treasury from the general county funds." Section 3 imposes a penalty of not less than \$500, nor more than \$1,000,

upon any county clerk who fails to compute and extend the taxes for any state fund according to the levy made therefor by law.

From this review of the legislation on the subject under consideration it sufficiently appears that the rate of taxation levied "for state purposes" was not intended by the legislature to include, as part and parcel thereof, the rates levied for the state institutions. Respecting both purposes, then, the rates were separately levied, and the laws in force required them to be separately extended, the rate for state purposes in one column, and that for state institutions in another column. This review also shows the legislative construction of the limitations on the rate of taxation imposed by section 11 of article 10 of the constitution. The rates therein prescribed relate only to taxes *for state purposes*; and, if this clause does not cover and include *all* state purposes (the position assumed by the relator), it follows that, as to the state purposes not included, there was no limitation.

We now approach the main question involved in this case. If the four mills so levied by the legislature of 1885 were designed to be in addition to the specific levies, the total rate levied for all state purposes or expenditures for the year 1886 amounts to five and seventeen-thirtieths mills on the dollar. The question, then, to be decided is, has the state legislature power and authority, under the constitution, when the valuation of the property within the state amounts to or exceeds \$100,000,000, to levy an annual state tax at a rate exceeding four mills on the dollar of valuation for *all* state purposes?

Article 10 of the constitution is devoted to the subject of revenue, and upon a correct construction of its provisions depends the solution of this question. This article requires the general assembly to provide by general laws for the levy and collection of state, county and municipal taxes; that the laws to be enacted shall prescribe such regulations as shall secure uniformity of tax-

ation, and a just valuation of the property to be taxed. It specifies what property shall be exempt; provides for a state board of equalization, and defines its powers; requires the general assembly to provide by law for an annual state tax, which shall be sufficient, with other resources, to defray the estimated expenses of the state government for each fiscal year; limits the annual appropriations and expenditures to be authorized by the general assembly to the total state tax provided or to be provided by law, and declares that the rate levied shall not exceed that allowed by section 11 of said article. Section 11 limits the rates of taxation for state purposes, and provides how the rate, for a specified period, may be increased. This section is as follows: "The rate of taxation on property, for state purposes, shall never exceed six mills on each dollar of valuation; and, whenever the taxable property within the state shall amount to one hundred million dollars, the rate shall not exceed four mills on each dollar of valuation; and, whenever the taxable property within the state shall amount to three hundred million dollars, the rate shall never thereafter exceed two mills on each dollar of valuation, unless a proposition to increase such rate, specifying the rate proposed, and the time during which the same shall be levied, be first submitted to a vote of such of the qualified electors of the state as, in the year next preceding such election, shall have paid a property tax assessed to them within the state, and a majority of those voting thereon shall vote in favor thereof, in such manner as may be provided by law." It will be seen that the language of this section is plain, clear and unambiguous, and that no room is left for construction as to the limitations therein imposed, unless it be in respect to the meaning intended to be conveyed by the clause "for state purposes."

Constitutions are adopted as a whole, and it is a rule of

construction applicable to them as well as to other instruments, that a clause or section which, standing by itself, might seem of doubtful import, may be made plain and its true meaning discovered by comparison with other sections or clauses of the same instrument. The second section of the revenue article just summarized requires the general assembly to "provide by law for an annual tax sufficient, with other resources, to defray the estimated expenses of the state government for each fiscal year." That this annual tax was designed to cover the entire expenses of the state, so far as necessary to provide therefor by taxation, is confirmed by the provision of section 16. This section prohibits the legislature from making any appropriations or authorizing any expenditure whereby the expenses of the state, during any fiscal year, shall exceed the total tax provided by law, and also prohibits the legislature from increasing the levy in excess of the rates allowed by section 11. If, then, any definition of the term "state purposes" is necessary to a decision of the questions presented by the defense of the respondent, it is to be found in the revenue article itself. Any legitimate expenditure of the state necessary to be provided for by a state tax is a state purpose, and the tax to be provided is a tax for a state purpose. It has been repeatedly stated in the decisions of this court, on evidence deemed by us sufficient to justify the statement, that a principal design of the framers of the constitution, and of the people in adopting the same, was to inaugurate an economical state government, and, in order to carry out this purpose, limitations against extravagance in the administration of it were inserted. Now, with such a purpose in view, how essentially unavailing it would be to limit the rate of taxation as to *certain* governmental purposes and to leave it without restraint or limitation as to *all other* purposes for which revenue may be provided. The absurdity of such a proposition is patent on its face.

In our judgment, a contrary intention is clearly expressed in section 11 of article 10, and the correctness of this judgment is amply sustained by the context.

The relator interposes, in behalf of the theory on which the case is prosecuted, the rule of *contemporaneous construction*. He reminds us that successive legislative assemblies, commencing with the adoption of the constitution, have construed this section as a limitation of the mill rate which may be levied to defray the expense of the state government proper, which is constituted, by article 3 of the constitution, of the *legislative, executive and judicial* departments. He urges, in support of this interpretation, that a state purpose is that which is necessary for the support of the state, and that, since the three departments named constitute the state government, it is only the taxes necessary for the support of these departments that can be said to be included in this clause. He maintains that the state institutions form no part of the powers of the state, are not material to its existence, and, while they are entitled to be supported by the state, yet, being of secondary importance to the existence of the state government, it could not have been intended by the framers of the constitution that the taxes necessary for their support should be classed as taxes "for *state purposes*." This position is supplemented and fortified by the argument *ab inconvenienti*. It is alleged that if the rate to be levied for *all* state purposes, including the one and seventeen-thirtieth mills directed by prior laws to be levied for the support of the state institutions, be now limited to four mills on the dollar, it will result in a deficiency of revenue to meet the current expenses of the state government, as fully appears from the expenditures of the past year.

The construction placed by several legislative assemblies upon the constitutional provision, and the inconveniences which may be occasioned by adopting a different construction, are deserving of, and have received, respectful

and thoughtful consideration. We approve the doctrine laid down by jurists and writers on constitutional law, that great deference is due to a contemporaneous legislative exposition of a constitutional provision. This doctrine rests on sound reason. Legal presumptions are in favor of the correctness of such expositions. It is said that the question whether a law is void for repugnancy to the constitution is one of such delicacy that it is seldom, if ever, to be decided in the affirmative in a doubtful case; also, that where a construction of a constitutional provision has occurred contemporaneously with the adoption of the constitution, been acquiesced in for a long period of time, and valuable rights are claimed under it, great weight is to be given it on account of the opportunities afforded the law-makers for ascertaining the intention of the instrument, and the inconveniences likely to result from a decision that such construction was erroneous. Cooley, Const. Lim. 81-86, 219; Sedg. St. & Const. Law, 412; Dwar. St. 65; *Fletcher v. Peck*, 6 Cranch, 128. But these, after all, are only suggestions to be considered and weighed by the judiciary when called upon to pass upon the correctness of legislative acts. The rule upon this subject is that the constitution is to be regarded as higher authority than any other law; that it is the true intent of this instrument that is to be enforced; and that, when its meaning is plain, it is the solemn duty of the courts to enforce it, regardless of incidental effects. It has been well said that "contemporary construction can never abrogate the text; it can never narrow its true limitations; it can never enlarge its natural boundaries." Story, Const. § 40.

After a careful examination of the subject under consideration, and giving due weight to all established rules and principles of construction applicable to a question of the nature and importance of that here presented, we are unable to interpret the limitation of the rate of taxation *for state purposes* otherwise than as already stated.

In our judgment, there is no room for a reasonable doubt concerning the intention of the provision in question. The language employed is not ambiguous, and the intent to restrict the legislature to an annual rate of taxation for *all state purposes*, when the valuation of property should reach \$100,000,000, appears to us to be clear, plain and palpable.

It may be true, as alleged by the attorney-general, that a levy of four mills on the dollar will not, at the present time, support the state institutions, and also provide a sufficient revenue to defray the necessary expenses of the departments of state. But this consideration, however serious, cannot control the decision of the question. "A constitution," says Judge Cooley, "is not to be made to mean one thing at one time, and another at some subsequent time, when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable." Const. Lim. 67.

It was foreseen by the framers of the constitution that such an emergency as the present might arise. Their determination to protect the people from the imposition of onerous taxes to support a state government is unmistakable. But to fix the proper limitations, such as would effectually restrain extravagance on the one hand, and at the same time make ample provision for the necessary expenses of a state government at different periods of its existence on the other hand, was, to a certain extent, experimental. To meet this difficulty it was provided, in the same section which limits the rate of taxation, that the rate might be increased, by submitting the proposed increase to a vote of the tax payers of the state.

The last proposition of the relator is that, if section 11 is to be construed as restricting the legislature to a tax of four mills on the dollar for all state purposes and expenditures under the present valuation of the property within the state, then the act of April 7, 1885, repeals by implication the acts levying separate taxes for the state

institutions. We cannot sustain this proposition. There is not such a repugnancy or conflict between the acts referred to as to justify the ruling contended for. The act of 1885, like the prior acts, levies a rate of tax for state purposes for the two fiscal years ensuing. No reference is made therein to the acts prescribing the rates levied for the state institutions. As suggested by counsel for respondent, several of these institutions were in existence at the time of the adoption of the constitution. Section 5, article 8, provided that these several territorial institutions should, upon the adoption of the constitution, become institutions of the state; and section 1 of the same article provides that "educational, reformatory and penal institutions, and those for the benefit of the insane, blind, deaf and mute, and such other institutions as the public good may require, shall be established and supported by the state in such manner as may be prescribed by law." The several acts in question were passed in conformity to, and in compliance with, the requirements of the constitution. Rates of taxation were fixed therein, supposed to be sufficient for the support of these several state institutions, and required to be levied annually. We have shown that the legislature was in error in supposing that a rate levied "for state purposes" could be properly construed as embracing a *portion*, and not *all*, state purposes. This construction being erroneous, it follows that the statutory direction to county clerks in making up the tax lists, to "compute and carry out in the proper column a state tax at the rate aforesaid," was likewise erroneous. We perceive no constitutional objection to the statute requiring the taxes levied for state institutions to be separately extended. But, if both directions were carried out literally, it would result in a state tax in excess of the constitutional limit, to wit, *five and seventeen-thirtieths* mills on the dollar. The latter error being in the direction to county clerks to extend the whole rate levied for state purposes in one

column, this direction must be construed to conform to the interpretation placed upon the clause "for state purposes." Thus construed, the duty of the respondent is to extend, in the proper column of the tax list, a state tax at the rate of four mills on the dollar, less the rates required by law to be extended in another column for the support of the state institutions.

The peremptory writ is denied.

Writ denied.

MURPHY V. PEOPLE.

1. Under Crim. Code ch. 25, § 21, providing that, in cases of homicide, "malice shall be implied where no considerable provocation appears, or when the circumstances of the killing show an abandoned and malignant heart," the fact of the use of a weapon or instrument calculated to destroy life is not a necessary condition precedent to the implication; but, where an assault is made on a woman with the hands and feet only, the accused being aware, from her condition, that such an assault might prove fatal, the implication arises, and a conviction of murder or voluntary manslaughter may be had.
2. Where, on an indictment for murder, the accused is convicted of voluntary manslaughter, he cannot be heard to say, on appeal, that such conviction is erroneous for the reason that no sufficient provocation was shown, and that under the evidence he should have been convicted of murder.
3. It is not error, on an indictment for manslaughter, for the court to refuse to give cumulative instructions specifying repeatedly each material ultimate fact, and telling the jury they must find, as to each, beyond a reasonable doubt.
4. On an indictment for murder, where there has been no attempt by the prosecution to show that the accused had ever been unkind to the deceased prior to the killing, it is not error in the court to refuse to admit cumulative evidence of acts of kindness by him.
5. Where a witness has testified that he is not in fear of giving his evidence, the admission of testimony by him that he was at one time in fear, though erroneous, is not ground for reversal.
6. On an indictment for murder, evidence that the accused repented the next day of his act, and was forgiven by the deceased, is inadmissible.

7. Error may not be assigned upon the refusal of the court to allow counsel for a prisoner to read the instructions of the court to the jury. Adverse comments upon instructions to the jury are not permissible. The manner and extent to which counsel may proceed in argument rests in the sound discretion of the court.

Error to District Court of Arapahoe County.

INDICTMENT for murder. The facts are sufficiently stated in the opinion.

Messrs. PATTERSON and THOMAS and I. WHITE, for plaintiff in error.

THEO. H. THOMAS, Attorney-General, for defendants in error.

ELBERT, J. The testimony leaves no doubt that the violence inflicted by the defendant upon the person of the deceased was the immediate cause of her death. The kicks with his boot upon her side and abdomen as she lay upon the ground, the bruises upon her body testifying to their force and violence, the ruptured liver beneath the bruises, and the three or four pints of blood in the abdominal cavity, as revealed by the autopsy, stand so closely connected and associated as to afford no room for reasonable doubt as to the cause of the death that so swiftly followed.

The defendant was indicted for murder. The jury found him guilty of voluntary manslaughter. The chief point urged by counsel for the prisoner is that "the verdict is contrary to the law and the evidence." The position, stated more specifically, is: (1) That, where the assault is made with the hands and feet, intent to kill will not be implied; (2) that there was an absence of provocation, one of the essential elements of voluntary manslaughter; that the verdict, for these reasons, should have been involuntary manslaughter.

If we turn to the Criminal Code (chapter 25, p. 297,

Gen. St.) we find murder defined as "the unlawful killing of a human being with malice aforethought, either express or implied. The unlawful killing may be inflicted by any of the unlawful means by which death may be occasioned." Passing over the statutory definition of express malice as not pertinent in this case, we find that section 21 declares that "malice shall be implied when no considerable provocation appears, or when the circumstances of the killing show an abandoned and malignant heart." It will also be noticed that the same section declares that murder perpetrated by any act greatly dangerous to the lives of others, and indicating a depraved mind regardless of human life, shall be deemed murder of the *first* degree. Section 25, defining involuntary manslaughter, declares that "where such involuntary killing shall happen in the commission of an unlawful act which in its consequences naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder."

It is contended that while malice may be implied in the two cases specified by the statute, namely, "when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart," that it can only be so implied when the homicide is committed by the use of a weapon or instrument calculated to destroy life; that, when the hands and feet are alone employed as the means of assault, malice will not be implied so as to warrant a verdict of murder, nor will any intent to kill be implied so as to warrant a verdict of voluntary manslaughter. The proposition cannot be admitted in the unqualified terms of its assertion. The doctrine, with its proper qualifications, is well stated by Bigelow, J., in the case of *Com. v. Fox*, 7 Gray, 585: "The court cannot sustain the broad proposition laid down by the counsel for the prisoner, that, in the absence of all evidence of express malice, there is no aspect of

this case which will authorize the jury to convict the prisoner of murder. It is undoubtedly true that in many cases, in order to prove implied malice in the sense in which that term is understood in the law, it is necessary to prove that the act of homicide was committed by the use of a weapon or instrument calculated to take life or inflict grievous bodily harm. As a party is held legally responsible for the natural or necessary consequences of his own unlawful act, the law implies malice where the circumstances of the homicide are such as to show that the act proceeded from an evil disposition, or a mind and heart regardless of social duty and fatally bent on mischief. This is proved, in many cases, by the use of weapons or other means which necessarily endanger life. But where death ensues from acts or means which, under the circumstances, could not have been supposed to endanger life, or to inflict great bodily injury, the law will not imply malice, because it cannot be reasonably inferred that the party charged intended the consequences which flowed from his act. If, therefore, death should ensue from an attack made with the hands and feet only, on a person of mature years, and in full health and strength, the law would not imply malice, because, ordinarily, death would not be caused by the use of such means. But the inference would be quite different if the same assault and battery were committed on an infant of tender years, or upon a person enfeebled by old age or worn out with disease. In such cases, the circumstances under which the act was committed would show a disposition quite as evil and malignant, and the use of means calculated to inflict as grievous bodily harm, as the employment of deadly weapons on a person in the full possession of his health and strength. So it has been held that the wilful exposure of a person laboring under sickness to a severe cold, whereby his disease was aggravated and death was occasioned, would be evidence of implied malice sufficient to warrant a conviction of murder.

1 Hawk. ch. 3, §§ 4, 5. In like manner, a slight blow on the head of a new-born infant, which, if inflicted on an adult, would be harmless, but which necessarily would endanger the life and actually caused the death of the child, is proof upon which a jury might well find a party guilty of murder. The real question is whether the circumstances of the homicide are such as to satisfy the jury that the party charged acted from an unlawful and evil design, with an intent to do grievous bodily harm, and that his acts were of a nature calculated to endanger life. From such acts the law will imply malice. In the present case, therefore, if the evidence satisfies the jury that the prisoner, at the time he committed the assault and battery on the deceased, knew, or had reasonable cause to believe, that she was sick and suffering from disease, and was thereby put in such a weak and feeble condition that his attack would endanger her life, or inflict on her great bodily harm, or hasten her death, it would justify the jury in finding implied malice, and convicting the prisoner of murder. But if he was not aware of her sickness, and had no reason to suppose that his acts would do her material injury, or any harm beyond that which would be occasioned by similar acts to a person in health, there would be no sufficient evidence of implied malice; and, although the acts of the prisoner hastened the death of his wife, he could be convicted of manslaughter only. *Macklin's Case*, 2 Lewin, Cr. Cas. 225; 1 East, P. C. 344."

Accepting the proposition of counsel for the prisoner that our statutes must be read and construed in connection with the rule announced in the foregoing case, we proceed to consider the evidence in this cause pertinent to its application. The prisoner and the deceased had lived together for some four or five years before the latter's death. She was the mistress of the prisoner, and about twenty-six years of age. She had long been intemperate. "During the year prior to her death, her

dissipation had been excessive. She was frequently seen reeling upon the streets. She fell upon the floor in saloons and upon sidewalks. She was boisterous and quarrelsome in public places, and policemen frequently took her home. She indulged in profanity, and but three months before her death, in one of her drunken frenzies, she shot at the defendant in his own house, the bullet passing through the rim of his hat, and lodging in the ceiling." The evidence discloses that the week before her death she was more or less intoxicated every day. Mrs. Ayers testifies that she was in bed almost every day of this week,—sick,—and that she complained of pain and difficulty in breathing. Her health was impaired and her body enfeebled by these vicious habits. Dr. Whitehill says that he treated her for chronic inflammation of the liver in the summer of 1883 in Leadville; that she was addicted then to the use of liquor to some extent; that she was a woman who was regarded as in delicate health, and as a chronic sufferer. On the evening prior to the homicide she had been on a drunken debauch. It is in evidence that, about 9 o'clock P. M., she went with a witness, Mrs. Ayers, to her home. She was under the influence of liquor when she started. Before going, she went for and procured a quart bottle of whisky. This she took with her, and upon reaching Mrs. Ayers' house she rapidly became more intoxicated. While attempting to pick up a ring which she had dropped, she fell upon her knees, hands and face, her face striking the floor. At half past 11 o'clock, Mrs. Ayers started home with her. She steadied her across the street, and saw her last going into the door of her house. Mrs. Ruckman testifies that she saw her after this out in the street. She was staggering; and, when Mrs. Ruckman last saw her, she was leaning against the gate-post. Mrs. Mason appears to have seen her later than this. It was after 12 o'clock when she (witness) went to her window, and saw the deceased in her room across the alley. Her face was red and swollen,

her eyes were blackened, and her hair disheveled. This was the last seen of the deceased until about 4 o'clock of the same morning, when she and the defendant were in the alley together, and when, as testified by Mrs. Mason, the violence was inflicted. The prisoner had full knowledge of the intemperate habits of deceased, and of her diseased and enfeebled condition resulting therefrom. There is no evidence to show that he knew the particulars of her dissipation upon the night of the homicide, but he knew that she had been drinking for several successive days prior thereto; and that he had every reason to know and believe that she was in a semi-intoxicated condition at the time of the homicide, suffering from the effects of a continued debauch, is apparent from his own statement. In answer to the question: "Do you recollect, when you returned and found that Mrs. Murphy was dead, saying, 'This is what I expected,' or words to that effect?" he said, "It had been running in my mind for some time that she was on these drunks. At times she was intoxicated. I considered her insane more than I did drunk from the effects of liquor. I presume I did say that or something else. She would always talk so; she would tell me, sometime, I would come home and find her dead. I am not positive that I used the language, but I might have said it. I know that feeling ran through my mind, and that is why I think probably I might have made that remark; for I thought, when I opened the window, and put my hand on her that morning before she got up, I thought then she was dead, because she had acted different from what she had ever done before." From the testimony it is evident that the deceased was in that enfeebled and besotted condition which borders on *delirium tremens*, and that the prisoner had full knowledge of it, as they were living together as man and wife. The prisoner asked her to get up, and let him in at the door; and while waiting for her to do so, and after going to the front door, and again returning

to the window of the bed-room, and again asking her, and evidently suspecting something wrong, he heard her raise the front window and get out. She screamed and ran out of the gate onto the sidewalk. Defendant caught her, and dragged her into the alley, choked her, threw her upon the ground, and, as she lay prostrate in her night-dress, kicked her upon her side and abdomen with his boot, and then dragged her, as Mrs. Mason says, either by her hair, or her night-dress, as the prisoner says, with his right arm around her neck, to the window, where he lifted the window and put her into the bed-room. The bruises upon the body of the deceased bore witness to the force and violence of the kicks given by the prisoner, and the ruptured liver immediately beneath one of the bruises left no reasonable doubt, under the evidence, as to the immediate cause of death.

Here, then, are the main features of this case. A drunken, besotted woman, her body enfeebled by her vicious habits, regarded by the prisoner himself as partially insane, awakened by him from a drunken sleep at 4 o'clock in the morning. With her mind evidently all confusion, and her nervous system all unstrung, she rushed into the street and screamed. The prisoner "grabbed" her, and pulled her into the alley, and either threw her down or she fell down. As she lay there on her back, with no clothing except her night-dress, the prisoner kicked her with his boot on the side and abdomen three or four times, and with such violence as to rupture the liver and cause her death. It is of no importance that the prisoner did not know that the deceased was diseased as to her liver, by its adherence to the walls of the chest and by "fatty degeneration." He presumably knew that she was a chronic sufferer, as stated by Dr. Whitehill. He did know of her general condition of weakness resulting from her excessive intemperance. Upon this point there is no conflict of evidence, nor is a question made respecting it. And here it may be said that it must be remem-

bered that the deceased was a woman; that women are, as a rule, physically weaker than men; that she was lying on her back on the ground, unprotected even by clothing; that such position exposed her body to the full force and effect of the prisoner's assault; that his kicks were upon her side and stomach,—parts of the body more or less vital; so that, independent of any special weakness or sickness of the deceased, it would have been a question for the jury whether the assault of the prisoner was such as, in its consequences, naturally tended to destroy her life.

Section 25 declares, *inter alia*, “that where an involuntary killing shall happen in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, * * * the offense shall be deemed and adjudged to be murder.” Here was an unlawful assault by the prisoner upon the deceased with his hands and feet alone. Whether the assault, under all the circumstances, was such as in its consequences naturally tended to destroy her life, was a question for the jury. If resolved by them in the affirmative, not only an intent to kill, but that malicious intent essential to murder, might be implied under the statute. In such a case the law deals with the party committing the unlawful act as though an actual intent to kill existed. It is the familiar proposition that a party will be held as intending, and legally responsible for, the natural or necessary consequences of his unlawful act. Hence we say, substantially in the language of the authority which we have quoted, that had the jury in the present case believed, under all the circumstances, that the prisoner, at the time he committed the assault and battery on the deceased, knew, or had reasonable cause to believe, that she was sick and suffering from her habits of intemperance, and was therefore put in such a weak and feeble condition that his assault upon her would (in the language of the statute), “in its consequences, naturally

tend" to destroy her life, they would have been justified, in the absence of features reducing the homicide to manslaughter, in finding implied malice, and convicting the prisoner of murder. Considering the physical condition of the deceased and the brutal character of the assault, had the jury found the prisoner guilty of murder, we should not have felt justified in disturbing their verdict on the ground that it was contrary to the law and the evidence. From the verdict of the jury, it is reasonably plain that while they believed that the prisoner knew, or should have known, that his assaults would endanger the life of the deceased, and that an intent to kill was justly implied from all the circumstances, that there were present such provocation and passion as called for a verdict of voluntary manslaughter instead of murder.

"In cases of voluntary manslaughter, there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing." Gen. St. § 711. If the jury erred, it was in allowing the prisoner the benefit of this provision. While the deceased, according to the statement of the prisoner, had a pistol in her hand, there is no evidence that she attempted to use it. It appears from the evidence, however, that she had, some time prior to the homicide, shot at the prisoner, and it may be that the recollection of this and the sight of the pistol in the hands of the deceased was one of the causes of the prisoner's anger. We think the provocation largely lay in the fact that she was his mistress; that he regarded himself as responsible for her conduct; that she had for a long time been behaving badly; that her noisy and violent conduct in public, when in liquor, had long humiliated and irritated him; that upon this particular occasion she rushed out in the street in her night clothes at an unusual hour of the night and commenced to scream, thus disturbing the neighborhood,

and bringing upon herself and the defendant, as he thought, extreme disgrace and reproach. His remonstrance with her at the time was, "Do you want to wake the neighborhood up and expose us?"

From all the evidence, it is reasonably plain that the prisoner acted under the impulse of passion, more or less intense, and under what he regarded as great provocation. At common law, words of reproach, however grievous, were not provocation sufficient to free the party killing from the guilt of murder; nor were indecent, provoking actions and gestures, expressive of contempt or reproach, without an assault upon the person. 2 Whart. Crim. Law, § 970, and cases cited. Provocations, unaccompanied by personal assault, were not infrequently recognized as sufficient; as where a man found another in adultery with his wife, or where the assault was upon a person sustaining some relation to the party killing, as father, son, or daughter. 2 Whart. Crim. Law, § 978 *et seq.* Mr. Wharton says: "The line between those provocations which will and will not extenuate the offense cannot be certainly defined. Such provocations as are in themselves calculated to provoke a high degree of resentment, and ordinarily induce a great degree of violence when compared with those which are slight and trivial and from which a great degree of violence does not usually follow, may serve to mark the distinction." 2 Whart. Crim. Law, § 983. We do not see that the provisions of our statute admit of the recognition of a provocation less in degree than that recognized as sufficient at common law. While the provocation, as shown by the evidence in this case, is not, in our opinion, sufficient in law to reduce the crime of the prisoner to manslaughter, we are not prepared to say that the prisoner may avail himself of an error in his favor, which, if allowed, would result in his acquittal of any of the grades of homicide. He cannot be again tried for murder; and if, as counsel contend, it is illogical and unphilosophical to say that the

prisoner may be convicted of voluntary manslaughter when the evidence shows that he was guilty of murder, it is equally illogical and unphilosophical to say that he may be convicted of involuntary manslaughter under the same state of facts. It is no defense to an indictment for manslaughter that the homicide alleged appears to have been committed with malice aforethought, and was therefore murder; but the defendant may in such case be properly convicted of the offense of manslaughter. 2 Whart. Crim. Law, § 932; *Commonwealth v. McPike*, 3 Cush. 181. It is a familiar rule that, where a minor offense is included in a greater, the defendant may be acquitted of the latter and convicted of the former. Of the sufficiency of the provocation and passion that reduce a homicide to the grade of manslaughter, the jury, under proper instructions from the court, are the judges. Under our statutes they are required to designate in their verdict the grade of the offense. We are unwilling to disturb their verdict in this case on the ground assigned.

We have carefully considered the objections made to the instructions given by the court. We do not think it would serve any useful purpose to review them separately and at length. We do not see that they could have conveyed to the minds of the jury any incorrect views of the law applicable to the facts of the case. We do not see that they were in any respect unfair to the prisoner. The objection to the first instruction, that it did not state the defense of the prisoner fully, and that the jury may have been led to disregard other possible theories of defense, is merely speculative. There is no doubt in our minds that the jury, under the instructions given by the court, duly considered the prisoner's case in all of its aspects. The fourth instruction is based upon the statutory provision that "where an involuntary killing shall happen in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, * * * the offense shall be deemed and

adjudged to be murder." The instruction was warranted by the evidence. If it be true of this instruction, as urged by counsel for the prisoner, that its language is such as to lead the jury to believe that his crime was murder and not manslaughter, it is clear, from their verdict of manslaughter, that the prisoner was not prejudiced by the instruction. The same may be said of the objection to the fifth instruction. If, as claimed by counsel, it was calculated to mislead, the verdict of the jury shows clearly it did not mislead in the manner claimed by counsel. These, as most of the objections urged against the instructions, rest in conjecture of possible prejudice. The seventeenth instruction, to which objection is made, was correct in law, pertinent to the case and fair to the prisoner. The modifications made by the court to the instructions prayed were properly made. The full effect of the modifications was to apply more fully and fairly the law to all the facts of the case. The instructions prayed by the defendant, and refused by the court, had already been substantially given by the court in various forms. It is not error to refuse to give cumulative instructions specifying repeatedly each material ultimate fact, and telling the jury that they must find, as to each, beyond a reasonable doubt. We think that the instructions given by the court, in a reasonably full, fair and plain manner, gave the law of the case to the jury, and this is all that can be required. But few convictions for crime can be sustained if every verbal criticism of instructions is to prevail, and speculative theories of possible prejudice are to be accepted as grounds of reversal.

The twentieth, twenty-second and twenty-third assignments of error go to the refusal of the court to admit certain testimony showing that the prisoner, upon a given occasion, a month or more prior to the homicide, was kind to the deceased; and also to the refusal of the court to allow a witness to answer the question: "Did

you, in the course of your visits, have an opportunity to know of the manner in which she was provided with the different articles of wearing apparel?"

"On a charge of murder, expressions of good will and acts of kindness on the part of the prisoner towards the deceased are always important evidence as showing what was his general disposition towards the deceased, from which the jury may be led to conclude that his intentions could not have been what the charge imputes." 1 Whart. Crim. Law, § 635.

While this is undoubtedly the rule, the evidence offered might well have been excluded on the ground that it was cumulative only. There was no effort upon the part of the prosecution to show that the prisoner, prior to the homicide, had ever been otherwise than kind to the deceased, or that he had ever failed in any way to properly support and supply her with anything necessary for her comfort. The defense had already been allowed to abundantly prove that the treatment of the deceased by the prisoner, prior to the homicide, had been kind, and that he supplied her well with food and clothing. No issue was made touching this, and it cannot be said that the prisoner was prejudiced by the refusal of the court to allow further testimony upon a point not contested by the prosecution. Whether such evidence would be admissible on a charge of manslaughter we do not decide.

It is objected that the witness Mrs. Mason was allowed to answer the question, "Have you not expressed yourself as being in fear of testifying?" her answer being, "Yes, sir; I did at one time, I think." Such testimony was clearly not pertinent. The witness had already in this connection answered that she was not under any fear of testifying. That she had once expressed such a fear was unimportant. This was substantially all the testimony on this point. Counsel do not appear to have pursued the subject, nor was it sought in any manner to

connect the prisoner with her fear. While the evidence was not pertinent, to say that it in any manner misled or prejudiced the jury against the defendant would be to indulge in conjecture. It must be treated as an indifferent thing, and not as substantive ground for reversing the judgment of the court below.

The evidence that the deceased, the next day after the assault, greeted the prisoner affectionately, and kissed him and her, was not pertinent, and was properly excluded. The fact that the prisoner repented his assault, and the deceased forgave it, could not affect the sentence the law was called upon to pronounce.

Nor was there any error in the refusal of the court to allow counsel for the prisoner to read the instructions of the court to the jury. The instructions had already been read to the jury, and it was not necessary to re-read them for their information. If counsel desired to read and comment adversely upon them to the jury, we know of no practice that permits it. If he desired to read them for his own information, for the purpose of familiarizing himself with the law of the case as given by the court, with a view of adjusting his argument thereto, it rested in the sound discretion of the court to say in what manner and to what extent he should proceed.

We have thus noticed substantially all the points argued by counsel which are properly presented by the record and which call for notice. The prisoner is accused of a grave offense, and we have given to his case that serious consideration which every such case demands. We think that he has had a fair, impartial trial; that no serious errors affecting, in any substantial manner, his rights, were committed; and that the jury impaneled to try him took the most favorable view of his case admissible under the evidence.

We therefore feel it our duty to affirm the judgment of the court below.

Affirmed.

ROGERS V. THE PEOPLE.

9	450
14	394
14	340
14	348
9	450
17	307
9	450
1a	158
9	450
20	493
9	450
6a	76
9	450
9a	541
9	450
17a	393
9	450
38	507

1. The original charter and various amended charters of Denver, where not referring to expressly enumerated constitutional inhibitions, are not obnoxious to the constitutional provision dealing with local or special legislation.
2. It was competent for the legislature to confer upon the city authorities exclusive control over the subject of prohibiting and suppressing bawdy-houses, and such exclusive control having been given, a party cannot be indicted and tried under the general law of the state, such power having been accepted by the enactment of an ordinance covering the offense.
3. The repeal or suspension of the general law thus effected within the city producing, as it does, a disturbance in the territorial jurisdiction of the criminal courts, is not obnoxious to the constitutional provision relating to the uniformity of jurisdiction, etc., of courts of the same class or grade.

Error to Criminal Court of Arapahoe County.

Messrs. ROGERS and McCORD, for plaintiff in error.

THEO. H. THOMAS, Attorney-General, for the People.

HELM, J. The principal question presented in this case may be briefly stated as follows: Does the statute of 1885, which confers upon the city council of Denver power, by ordinance, "exclusively to prohibit and suppress * * * dance-houses, bawdy-houses, disorderly houses, houses of ill fame or assignation, or any place for the practice of lewdness or fornication within said city," have the effect of suspending, within the corporate limits of the city, the operation, *pro tanto*, of section 839 of the General Statutes, which reads: "If any person shall be guilty of open lewdness, or other notorious acts of public indecency, tending to debauch the public morals, or shall keep open any tippling or gaming house on the Sabbath day or night, or shall maintain or keep a lewd house or place for the practice of fornication, or shall keep a common, ill-governed, and disorderly house, to the encouragement of idleness, gaming, drinking, forni-

cation, or other misbehavior, every such person shall, on conviction, be fined not exceeding \$100, or imprisonment in the county jail not exceeding six months?"

This general provision was adopted upwards of twenty years ago, and has never been repealed. The special act above mentioned is the later of the two. Therefore, if both are valid, and if both cannot be given full force and effect, the former must give way to the extent of the conflict existing between them.

The original charter and various amended charters enacted for the government of the city of Denver, in so far as they do not refer to matters within the expressly enumerated constitutional inhibitions, are not obnoxious to objection under section 25, article 5, of the constitution, which treats of local or special legislation. And, in general, a legislative amendment of the charter will not be reviewed by this court for the purpose of determining whether, under the concluding sentence of this constitutional provision, the changes incorporated could be made by general law. *Brown v. City of Denver*, 7 Colo. 305; *Carpenter v. People*, 8 Colo. 116; *Darrow v. People*, 8 Colo. 426.

The use by the general assembly of the word "exclusively," in conferring power to prohibit and suppress bawdy-houses, indicates a design to place that matter entirely under the control of the city council. A provision relating to the prohibition and suppression of bawdy-houses has existed in the charter since 1874, but until the last session of the legislature the authority thus vested in the council was not exclusive. This fact demonstrates that the word "exclusively" could hardly have found its way into the enactment through inadvertence or mistake. The intention of the legislature in the premises is too plain to admit of serious doubt.

The pleadings show that the city council accepted and duly exercised the authority conferred; that an ordinance was passed in strict conformity with the statute in

question, and fully covering the subject. Under the circumstances, unless the general assembly was powerless to delegate such exclusive control, or unless the legislative action be in conflict with some constitutional provision other than the one above mentioned, it follows that all prosecutions for committing the forbidden act within the limits of Denver must take place under the city ordinance.

Can the general assembly confer upon the council exclusive legislative control over this subject? A house of prostitution is a constant menace to the public peace and good order of the community in which it exists. It is a nuisance, and its keeping a misdemeanor, at common law. Its suppression and punishment are proper subjects of police regulation. In one form or another the authority to prohibit and suppress is very generally given to cities and towns and quite as generally exercised by them. It is true, the general policy of our statutes and of the common law is to wholly inhibit these places, and it is also true that the people of the entire state are, to some extent, interested in the suppression thereof. But, in the *first* place, the statute gives the council no authority to *license* or *regulate* — they can only prohibit and suppress — the evil; and, *secondly*, the existence of such houses within the corporate limits is a matter that peculiarly concerns the citizens of Denver. They, more than the people elsewhere, are brought into contact therewith, and suffer through the vicious influences emanating therefrom. Moreover, the subject is one with which, from its very nature, the local authorities can more intelligently and effectively deal than can the general assembly. It is a matter fairly pertaining to the province of "local self-government." It was competent for the legislature to give the city council legislative control. Cooley, Const. Lim. 228, and note; also, page 261. And we discover no sufficient reason for holding that this authority shall not be made exclusive and plenary, con-

trolled only by such express constitutional inhibitions or mandates as may be found applicable. *State v. Clarke*, 54 Mo. 17; *State v. De Bar*, 58 Mo. 395; *Davis v. State*, 2 Tex. App. 425; *Berry v. People*, 36 Ill. 425; *State v. Gordon*, 69 Mo. 383; *Hetzer v. People*, 4 Colo. 45; *Huffsmith v. People*, 8 Colo. 175; *Seibold v. People*, 86 Ill. 33, and cases.

In *Berry v. People* and *State v. Gordon*, above cited, the offenses charged were gambling and disturbance of the peace, respectively. In the cases of *Hetzer*, *Huffsmith*, and *Seibold v. People*, the prosecutions related to tipping-houses or the vending of intoxicating liquors. But, so far as the delegation of exclusive legislative control is concerned, we think these decisions may fairly be cited in support of our conclusion in the case at bar.

It is insisted that the power "to prohibit and suppress" does not include the power to provide for punishment. This proposition is not tenable. The right to pass ordinances usually carries with it "the incidental right to enforce them by reasonable pecuniary penalties." 1 Dill. Mun. Corp. §§ 338, 376, and note 1; Bish. St. Crimes, § 21. Besides, section 18 of the act in question reads as follows: "The city council is hereby authorized to provide for the punishment of all offenses against the ordinances of the city, by imprisonment," etc. Having the authority to pass an ordinance to prohibit and suppress bawdy-houses, and having power "to provide for the punishment of all offenses against the ordinances," it follows that the council is authorized to provide for the punishment of those who violate the ordinance imposing this particular inhibition. The phrase "to provide for the punishment," as used, confers at least concurrent power over the subject of punishment. Such power must, of course, be exercised subject to constitutional requirements in relation to courts, their procedure and practice.

But a further and more embarrassing question is pre-

sented. Section 28, article 6, of the constitution provides as follows: "All laws relating to courts shall be general, and of uniform operation throughout the state; and the organization, jurisdiction, powers, proceedings and practice of all courts of the same class or grade, so far as regulated by law, and the force and effect of the proceedings, judgments and decrees of such courts severally, shall be uniform."

Since the effect of the act now under consideration is to repeal, within the corporate limits of Denver, a part of section 839 of the General Statutes, and since no prosecutions for offenses committed within the city can be maintained under the provision thus repealed, the indirect result is that the territorial jurisdiction of the criminal court of Arapahoe county over certain misdemeanors is correspondingly curtailed; while the power of the criminal courts in Lake and Pueblo counties to entertain prosecutions throughout those counties for such offenses, under the general statute referred to, remains the same as before. Therefore, counsel contend the uniformity of jurisdiction required by the constitution among the criminal courts, which are unquestionably courts of the same class or grade, is by virtue of the Denver statute destroyed.

Section 13, article 14, of the constitution commands the legislature to provide by general law for the organization and classification of cities and towns. It limits the number of such classes to four, and requires that the powers and restrictions of all cities or towns belonging to the same class shall be similar. This provision clearly authorizes the granting of different powers and different restrictions to the different classes of municipal corporations mentioned. And there is clear constitutional authority for bestowing upon one class, within certain limits, exclusive legislative control over a given subject pertaining to local self-government, while another class is allowed only concurrent power in connection therewith.

If the existing general act relating to cities and towns placed in the first class all cities having a population of thirty thousand or upwards, and conferred upon them the identical powers specified in the special charter before us, Denver could, at present, be the only city of this class. But, if Denver were re-incorporated under such general law, there would be produced the exact result we are now discussing; that is to say, the *exclusive* power to prohibit and suppress bawdy-houses would be exercised by Denver alone, a part of section 839 of the General Statutes would be suspended within its corporate limits, and the territorial uniformity of jurisdiction of the criminal courts would thus suffer the self-same disturbance of which counsel complain. But if the legislature, in its wisdom, should see fit to repeal section 839, aforesaid, the disturbance would at once cease, and entire territorial uniformity would be restored. A like result would also follow such repeal where, as in the case at bar, the supposed want of uniformity is produced by a *special act* which is otherwise constitutional.

Thus it appears that the view urged upon us in this connection leads inevitably to the following, among other curious conclusions, viz.: That the constitutionality of a statute may, in a given instance, be made to depend, not upon its character or its *status* with reference to the constitution, but upon its relation to some other legislative enactment; and that in such case while each act, standing alone, would be perfectly valid, the co-existence of both renders one of them unconstitutional and void.

In construing constitutional as well as statutory provisions, the cardinal rule is to discover and enforce the intention of those who made them. Hence we are led to inquire, what was the purpose of the framers of the constitution when they inserted section 28 of article 6, and what was the purpose of the people when, in their sovereign capacity, they adopted it? It is a well known fact that under our territorial government, laws providing

for the organization, jurisdiction and procedure of courts of the same grade were often widely different. This diversity was sometimes as great "as if [to use the language of Mr. Justice BECK in *Ex parte Stout*, 5 Colo. 509] such courts were located in different states or territories." It is unnecessary to dwell upon the inconveniences and evils resulting from such a condition of affairs, or to detail the advantages arising from uniformity in these respects throughout the state. The importance and value of such uniformity are obvious to all interested persons, particularly to all members of the bench and bar.

It was doubtless with a view to preventing, under the new government, the existence of such mischievous confusion in this regard that said section 28 was adopted. The attention of the constitutional convention was directed to those laws which had been or would be passed by the legislature on the subject of courts, their jurisdiction and procedure. The members of that body did not contemplate, and were not considering, general legislation with reference wholly to other matters. Their leading design in framing the provision before us evidently was to compel such legislation as would remedy the existing evils in this respect, and to have all laws thereafter adopted in relation to courts general and of uniform operation throughout the state; also to require that statutes providing for the organization and defining the jurisdiction, practice or procedure of courts of the same class or grade, be so drawn as to secure to *such* courts an organization, jurisdiction, practice and procedure in all respects similar. This section was not intended to inhibit the passage of statutes entirely upon other subjects, and sanctioned by other constitutional provisions, which, however, might incidentally and remotely operate to disturb, for the time being, the *territorial* uniformity of jurisdiction possessed by courts of the same class or grade.

We feel compelled to overrule the objection in this behalf urged. In the *first* place, the statute conferring

upon the city council of Denver exclusive authority to prohibit and suppress the evil mentioned, is sanctioned by the constitution itself. *Second.* It does not deal, nor was it intended to deal, in any manner with courts or their jurisdiction. It was simply designed to place in the hands of the city council legislative authority to pass an ordinance prohibiting and suppressing the evil, together with the incidental authority to prescribe a penalty for the violation thereof. The power of designating a court in which prosecutions for the offense should take place, or of prescribing the jurisdiction and procedure of such court, is not sought to be given, nor is there any attempt to exercise it. *Third.* As we have already seen, the effect of this statute is simply to suspend, within the corporate limits of Denver, the operation of a part of said section 839, which general law does not refer to courts, or purport to prescribe the jurisdiction or procedure of any class of courts. On the contrary, it was passed solely for the purpose of recognizing as misdemeanors certain acts therein enumerated, and designating the punishment that should be inflicted upon persons found guilty thereof.

To say, under all the circumstances, that there is such a conflict between the statutory provision assailed and section 28, article 6, of the constitution as invalidates the former, would be to adopt a rule of constitutional interpretation of which we find in the books no sufficient recognition. Besides, it would, in our judgment, lead to a vast amount of uncertainty and litigation; for, by thus giving an effect to constitutional provisions not intended by the convention or the people, necessary legislation would be rendered more difficult than it is, and many beneficent statutes would fall. Upon this view we rely with confidence; but, were we to admit that the question is a doubtful one, there would still, under the authorities, be no ground for judicial interference.

We are aware of the principle that in law, as a gen-

eral thing, that which cannot be done directly cannot be done indirectly. But, as we have tried to show, this principle has no real application to the case at bar. Any clear legislative attempt to evade indirectly a constitutional provision would be as promptly held void as a direct assault thereon couched in the most unambiguous terms.

The branch of the discussion relating to the constitutional provision which clothes district courts with "original jurisdiction of all causes, both at law and in equity," will not be considered. The subject is not fairly involved in the case, and our views thereon would be *obiter dicta*.

From the foregoing conclusions it appears that the plea to the indictment was good and that the demurrer thereto should have been overruled. The judgment is accordingly reversed.

Reversed.

ROBERTS V. THE PEOPLE.

9	458
3a	590
9	458
8a	343
9a	549
9	458
28	151
9	458
d20a	163
9	458
f36	451

1. Under the statute an application for a change of venue must be made at the earliest moment.
2. When a want of information is set up as an excuse for the failure of a party to avail himself of a legal right within the time prescribed by law, no ease for relief exists if it appears that the party voluntarily shut his eyes to the facts and remained wilfully ignorant of the requisite information.
3. The statute providing for a change of venue is only mandatory upon the court where the party applying has brought himself within the provisions.
4. The judge of a court cannot reasonably be required to postpone the business of his court in order to suit the convenience of lawyers who may desire to attend the sessions of other courts.
5. In prosecutions for obtaining money or property under false representations it is held not to be essential to constitute the offense charged that the pretenses by which the money or property is obtained were made directly to the party defrauded.
6. Where the evidence corresponds with the indictment in its general design and purport a technical variance will not be fatal.

7. Ample authority is conferred by the statute on the county clerk to administer all oaths necessary to be administered in matters pertaining to the business and duties of his office, and also to administer oaths generally.
8. The statutes provide for the appointment of deputy clerks and their qualification, and it necessarily follows that a deputy is authorized to administer all oaths proper to be administered and taken in the transaction of official business pertaining to the office of county clerk, and in performing the functions of clerk thereof.
9. The rule governing the allowance of claims by the board of county commissioners is that the authority must be found in the statutes, either in express words or by fair implication.
10. The compensation for every legitimate charge against the county is not fixed by statute, nor even expressly provided for, but it is within the functions of the board of county commissioners, in such cases, to allow reasonable compensation.
11. The provisions of the statute for the appointment of deputy assessors are a recognition by the general assembly that assistance for the assessor may become a necessity, and, when it does, it will constitute a proper charge against the county.
12. It not being through any neglect or default of the assessor that the county was not divided into districts which would have authorized him to appoint deputies instead of clerks, it would be inequitable to require the assessor to bear the expenses thus necessarily incurred. Having paid the clerks, the assessor's right to reimbursement, although not covered by the express terms of the statute, may be fairly implied therefrom, also the power of the commissioners to allow the claim.
13. The principle is recognized in criminal jurisprudence that proof of certain facts may lead irresistibly to the presumption that another act, of which there is no direct proof, was committed or done.

Error to Criminal Court of Arapahoe County.

ROBERTS, the defendant below, was tried and convicted of the crime of obtaining money under false pretenses, at the September term, 1884, of the criminal court of Arapahoe county. Motions for a new trial and in arrest of judgment were made and denied, and the prisoner sentenced to confinement in the penitentiary for a period of ten months. Defendant was the county assessor of Arapahoe county in the year 1883, and previous years, and in consequence of the great amount of clerical work

required to be performed in his office, the county commissioners had allowed him, for a period of three years or more, to employ as many clerks as were necessary to complete the assessments in the time limited by statute, at the expense of the county. Defendant was accustomed to pay these clerks, afterwards presenting bills therefor to the commissioners, which were audited, allowed, and warrants drawn upon the county treasurer for the several sums, payable to bearer, and delivered to the defendant, who would collect the same. It was finally discovered that defendant was defrauding the county by charging for more clerical work than was performed, and at higher rates of compensation than he paid therefor. It appeared in evidence, upon an investigation of his conduct by the county attorney and the board of commissioners, that he had presented several fraudulent vouchers which had been allowed and paid. It also appeared that, when charged by the commissioners with the perpetration of these frauds, he admitted the making of overcharges, but claimed the right to do so. He also admitted that he had realized in this manner, during the preceding three years, as nearly as he could estimate, the sum of \$3,108. The count of the indictment under which he was tried and convicted charges, substantially, that on the 5th day of July, 1883, said Roberts was county assessor of Arapahoe county, and, with intent to cheat and defraud said county, he falsely and fraudulently represented that a certain account in favor of one Charles M. Farrar, and against said county, which he then and there presented to said county for allowance and payment, was a just and true account of the indebtedness of the county to said Charles M. Farrar for services rendered during the month of June, 1883, in making the assessment of real and personal property in said county.

A copy of the account, with the affidavit attached thereto, is inserted in the indictment, and is as follows:

"VOUCHER.

"DENVER, COLORADO, June 30, 1883.

"*County of Arapahoe to C. M. Farrar, Dr.*

"Services: Assessment, 1883. June, 16 days, \$6, \$96.

"*State of Colorado, County of Arapahoe — ss.:* George C. Roberts, being first duly sworn, doth depose and say that the above account is legal, just and true, and that the services therein charged for have been actually and necessarily rendered to and for said county, and that the same has not been paid, nor any part thereof.

"GEORGE C. ROBERTS, Assessor.

"Subscribed and sworn to before me this 30th day of June, A. D. 1883.

"W. H. SALLSBURY, Deputy County Clerk."

The indictment further charges that defendant falsely and fraudulently pretended that Farrar had performed sixteen days' service in the month of June, 1883, in making said assessment; that he demanded \$6 per day for his services; and that defendant had full right and authority to collect the amount of the account prescribed, \$96, from said county. By way of negation of the pretenses, it is alleged that Farrar did not serve sixteen days in June, 1883, in making said assessment, but served seven and one-half days only; that he did not demand \$6 per day for his services, but only the sum of \$4 per day; and that the county was indebted for said services the sum of \$30 only, which was all that defendant had the right or authority to collect from the county. It then alleges that the county of Arapahoe, relying upon and believing these false pretenses to be true, delivered to the defendant \$96 in lawful money of the United States, of the value of \$96, of the moneys, goods, chattels and personal property of the said county of Arapahoe, in payment of said amount; and that said Roberts, by means of the false pretenses mentioned, feloniously, fraudulently, knowingly and designedly obtained and received from said county the sum of \$96, and that the

county was by these false pretenses defrauded of that sum.

Messrs. PATTERSON and THOMAS and L. R. RHODES, for plaintiff in error.

Mr. THEO. H. THOMAS, Attorney-General, for defendants in error.

BECK, C. J. The first error assigned is the denial of the defendant's petition for a change of venue. This petition was not filed until the day preceding the trial. The third section of the statute under which the application was made (R. S. 634) provides as follows: "Changes of venue shall not be granted after the first term at which the party applying for the same might have been heard, unless the cause shall have arisen subsequent to such term." R. S. 636. The indictment was presented to the April term, 1884, of the district court of Arapahoe county, and the cause was removed into the criminal court for trial in the month of May succeeding, and afterwards continued to the June term thereof. On the 11th day of June the defendant filed his plea of not guilty to the indictment, and the cause was then continued to the September term. On September 1, 1884, the cause was set down for trial on September 10th, and on the 9th the petition for change of venue was presented. The ground of the application was the alleged prejudice of the minds of the inhabitants of the county against the defendant. He states that this prejudice was created by sundry publications in the Daily Rocky Mountain News, a newspaper published in the city of Denver, charging him with malfeasance in office, and with obtaining money of the county of Arapahoe by false pretenses, perjury and fraud. All the dates given, except two, are of publications made in the month of February, 1884. The other two were January 31, 1884, and September 7, 1884. The excuse given in the petition for not making the application for the

change of venue at the June term is as follows: "Your petitioner was not until the 8th instant made aware of the extent to which the publications of the said newspaper had prejudiced your petitioner in the minds of the inhabitants of the said county of Arapahoe; * * * and on the 8th instant, for the first time, your petitioner was informed that a strong and prevailing prejudice was and is existing in the minds of the inhabitants of said county against your petitioner; and by inquiry among his friends and acquaintances, your petitioner hath become and is satisfied, and verily believes, that by reason of such prejudice existing against him, your petitioner cannot expect a fair and impartial trial of this cause in this court."

This is not a straightforward averment that the defendant did not know of the prejudice existing in the minds of the inhabitants of the county *before* the 8th instant, but only that he was not aware of the *extent* thereof until that day. Nor is it clear that his previous knowledge was insufficient to satisfy his mind that he could not expect an impartial trial. The averments concerning the specific information communicated to him on that day, and the inquiries made thereupon, do not rebut the inferences mentioned.

The provision of our statute above quoted is similar to a corresponding provision of the statute of Illinois on the same subject. Under said provision the supreme court of that state held that an application for a change of venue must be made at the earliest moment. Excuses for delay of the character here presented are held insufficient. In *McCann v. People*, 88 Ill. 103, the ground of the application was the prejudice of the presiding judge, and to account for the delay in making the motion the defendant averred in his affidavit "that a full knowledge of that fact did not come to his knowledge until the day the petition was presented." The court say: "Giving the affidavit a fair and reasonable interpretation, the

defendant had some knowledge of the prejudice of the judge long before he made the application. That he had not 'full' knowledge is too indefinite, and does not comply with the law. Full knowledge might never come to him; but he had knowledge, and, for aught that appears, it might have been sufficient to satisfy his mind." In *White v. Murtland*, 71 Ill. 258, the petition stated "that he did not know that prejudice existed against him among the inhabitants of said county to the extent that it does, until the 25th day of July, 1872." This petition was held insufficient on two grounds: *First*, it implies he had knowledge that the inhabitants of the county were prejudiced against him before the 25th day of July; *second*, it fails to state when this prejudice arose, or first came to his knowledge.

The present application is more faulty still; for, while it is equally indefinite as to when the knowledge of the prejudice of the inhabitants of the county first came to the defendant's knowledge, it does show that the principal acts creating the prejudice were performed six months before the application was made.

But perhaps a more serious defect in the petition is, it discloses that defendant's want of knowledge as to the extent of the prejudice existing against him was wholly attributable to his own voluntary action. The statement referred to is: "*And your petitioner*, since the publication of the said accusations against him in the said newspaper was commenced, hath continually and carefully avoided, as far as possible, all intercourse with his *neighbors* and citizens, and *especially* all conversation in respect to the said accusations, and the sentiment of the *community* in respect thereto." There is no principle better settled than this: That, when a want of information is set up as an excuse for the failure of a party to avail himself of a legal right within the time prescribed by law, no case for relief exists if it appears that the party voluntarily shut his eyes to the facts, and remained wil-

fully ignorant of the requisite information. The statute under consideration is only mandatory upon the court when the party applying for a change of venue has brought himself within its provisions. The defendant, not having complied with its terms, cannot be said to have been prejudiced by the denial of his petition.

The second error assigned is the overruling of the motion for a continuance of the cause. This motion was made on the day which had previously been assigned for the trial, and on which the trial commenced. It was based on affidavits showing that three of the four lawyers in the firm retained by the defendant would necessarily have to attend other courts before this trial would probably be finished, and that the fourth member of the firm was sick, and absent from the state. One of the courts necessary to be attended by three of the counsel, according to the affidavits, had not convened at the time the application was made. The judge of the criminal court cannot reasonably be required to postpone the business of his court in order to suit the convenience of lawyers who may desire to attend the sessions of other courts. Such a ruling could not be sustained on either principle or authority, and, if it could, the results would be detrimental to the public interests, and in many cases to the interests of suitors as well. It would in many instances interfere with the prompt dispatch of business in the various courts, and tend to prolong their sessions, thus adding materially to the expenses thereof.

It is contended that the denial of the application in this case was an abuse of sound discretion, since it deprived the defendant of the services of counsel who were familiar with his case, and forced him into the trial with new counsel altogether unfamiliar with the facts and the law. If the denial of the continuance necessarily produced all these disadvantages, it ought certainly, in a case of this character, where the liberty of the citizen is involved in the issue, to be held an abuse of discretion.

But we do not think such was the necessary result of the ruling. Only one of the defendant's counsel had an engagement for the days occupied by the trial, and the court could not know, at the time of its decision on the motion, that none of defendant's counsel would appear at the trial and take charge of his defense. There was therefore no abuse of discretion in the ruling itself. Had the defendant, on finding himself abandoned by his counsel, brought that fact to the knowledge of the court, with a request for reasonable time to engage other counsel, and for such counsel to familiarize himself with the case, and the questions of law involved, and had such application been denied, much stronger grounds would exist for charging an abuse of judicial discretion. But if, upon the calling of the case for trial, the defendant with his new counsel appeared, and manifested a readiness to proceed, and the record contains nothing to the contrary, it cannot be held to have been the duty of the court, *sua sponte*, to have suggested and ordered a postponement for this purpose.

The third error discussed, and the one under which nearly all remaining objections are discussed, was the overruling of defendant's motion for a new trial. The motion was based on the following grounds: (1) The verdict was contrary to law; (2) it was wholly unsupported by law; (3) it was wholly unwarranted by law. The main contention under this assignment is that there was such a variance between the allegations of the indictment concerning the fraudulent acts charged, and the proofs adduced in support thereof, as rendered the verdict of guilty wholly unwarranted.

The first point urged in support of this theory is that the false representations were alleged to have been made to the county of Arapahoe, and not to an officer of said county, and that the proof only extended to representations made to certain county officers. In prosecutions of this character it is held not to be essential to constitute

the offense charged that the pretenses by which the money or property is obtained were made directly to the party defrauded. An indictment charging false pretenses made to a certain person, and money paid by him on the strength thereof, is supported by proof that the false representations were made to an agent who communicated the same to the principal. 1 Whart. Crim. Law, § 598; 2 Whart. Crim. Law, §§ 2145, 2146; *Commonwealth v. Call*, 21 Pick. 521. The county of Arapahoe, like every other organized county in the state, is made by statute a body corporate and politic, and, like other corporations, it can only act by its officers and agents. The board of county commissioners is authorized by law to represent the county and act for it in the settlement of all accounts of receipts and expenses, and in the allowance of accounts chargeable against the county. This board is authorized to issue orders on the county treasurer for the payment of the accounts so allowed, and it is made the duty of the latter officer to pay the same out of the county money. Gen. St. §§ 538, 635. The board of county commissioners, therefore, is constituted by law the financial representative of the county, to whom all unliquidated claims against the county are to be presented for allowance. No other officer or agent of the county is invested with similar powers; and the presentation of a claim to this board, the allowance of which comes within the scope of its powers, is practically a presentation thereof to the county.

It appears from the evidence that the general custom and practice of presenting claims against the county for allowance by the board of county commissioners was to make out the claim in writing in the form of an itemized account, showing the nature and value of the several items, and the total amount of the claim. To this was attached the affidavit of the person presenting the claim, to the effect that the materials or services charged were furnished or rendered the county; that the account was

just, correct, and that it was due and wholly unpaid. The account was then left with the clerk or deputy clerk who attended the sessions of the board, whose business it was to hand in all accounts presented for allowance against the county. The manner of payment of an account audited and allowed is statutory, and is above stated. This was the course adopted by the defendant. He pursued the various steps above indicated, in accordance with the prevailing usage and practice, and we are of opinion that his conduct in this behalf substantially corresponds with the allegations of the indictment, and that whatever variance may exist in this particular is merely technical. The defect is covered by the principle that, "when the evidence corresponds with the indictment in its general design and purport, a technical variance will not be fatal." 1 Whart. Crim. Law, § 593. The indictment charged a criminal offense, and advised the defendant what acts of his were the subject of complaint. These acts being substantially proven as laid, disposes of this question of variance. It was not necessary for the defendant to appear personally before the board, and to make his representations verbally. The conduct and acts of a party are sufficient to constitute the offense without any verbal assertion. 2 Whart. Crim. Law, § 2113.

There is no force in the objection that the account was not itemized as required by statute. The county commissioners had been allowing accounts for the services of department clerks and assistants, for the same kind of services there charged, upon the county assessment lists, for a period of four years, and there is no ground for saying that the items given did not inform them of the nature of the services claimed to have been rendered in this instance. The items given informed the board that the services were rendered by C. M. Farrar in the month of June, 1883, upon the assessment for that year; that he had worked thereon sixteen days, at the rate of \$6 per

day, amounting to the sum of \$96. This was all the information necessary under the circumstances.

The next proposition is that it appeared on the face of the account that it was not a valid charge against the county, and that the board of county commissioners were without authority to audit and allow it. The first point urged in support of the proposition is that the account was not verified by affidavit, as required by section 545, p. 259, Gen. St. The evidence shows that the defendant presented the account to the deputy clerk, Sallsbury, made affidavit before that officer to its correctness, and left the same with him for presentation to the board. But counsel contend that a deputy county clerk is not authorized by statute to administer an oath. The reasoning by which this conclusion is reached is that the administering of oaths is not one of the duties pertaining to the office of county clerk; that the authority conferred by the statute on the clerk himself is an authority to administer oaths generally, and is wholly independent of his official duties as county clerk. Under this assumption it is argued that the appointment of a deputy only authorizes him to perform those duties which legitimately pertain to the office itself. We think the statute is capable of a broader interpretation than counsel have given it. Ample authority is conferred by the statute on the clerk to administer all oaths necessary to be administered in matters pertaining to the business and duties of his office, and also to administer oaths generally. The language is: "That the county clerks of the several counties in the state of Colorado be and are hereby authorized, within their respective counties, to administer all oaths of office, and other oaths required to be taken by any person upon any lawful occasion, and to take affidavits and depositions concerning any matter or thing, process or proceeding, pending or to be commenced in any court, or before any justice of the peace, or on any occasion wherein such affidavit or deposition is authorized or required by law to

be taken." The duties enjoined by law on this officer are various, and occasions for the taking of affidavits and for administering oaths must frequently arise in the discharge of his official duties. He is county clerk, clerk of the board of county commissioners, clerk of the board of health in certain cases, and required to act as clerk of the special court constituted by statute for the trial of contested election cases of county officers. The necessity for the exercise of this power exists in all these departments of official duty, from the swearing of a witness in the trial of a contested election case, to the verifying of an account preparatory to its presentation for allowance to the board of county commissioners. The statute provides for the appointment of deputy clerks, and requires the written instruments appointing them to be filed in the clerk's office. It requires these deputies, before entering upon their duties, to take and subscribe the like oath of office as the clerk himself has taken and subscribed, and to deposit the same in the office wherein the clerk's official bond is deposited, and provides that the county clerk, and the sureties upon his official bond, shall be responsible for the official acts of such deputies. Gen. St. pp. 266, 285, §§ 575, 669. The official authority of a deputy, when duly qualified, extends to the performance of all the duties of the office, in case of the absence or disability of the clerk, or in case of a vacancy in his office. Gen. St. p. 266, § 575. It necessarily follows that the deputy is authorized to administer all oaths proper to be administered and taken in the transaction of official business pertaining to said office, and in performing the functions of clerk thereof.

The next objection urged is that the claim did not constitute a legal charge against the county; that the county commissioners allowed it of their own wrong; that the county was not bound thereby, consequently lost nothing by its allowance; hence that the offense charged in the indictment, to wit, the defrauding of the county, was

not established. The ground of this objection is that no provision is made by law for the payment, by the county, of clerical assistance employed by the assessor. It is true that no express provision has been made for this purpose, and it is likewise true that the county commissioners are required by statute, whenever they shall be of opinion that an assessor is unable to perform the duties of his office within the time prescribed by law, to divide the county into assessment districts and to require the assessor to appoint a deputy in each district. Provision is made for the payment of such deputies, not to exceed the sum of \$7 per day each. Gen. St. p. 281, §§ 648, 649. Now, the question is, in a county where the duties of the assessor cannot be performed by that officer without clerical assistance, but the county has not been divided into districts as provided for by this statute, may the assessor employ necessary clerks to foot up the assessment rolls, make copies, and do other writing and clerical work necessary to complete the assessment within the time required by law, and will the expenses so incurred constitute a proper charge against the county?

The rule governing the allowance of claims by the board of county commissioners is that the authority must be found in the statute, either in express words or by fair implication. In other words, in order to bind the county, the county commissioners must act within the scope of their authority. Where a claim is clearly not a legitimate charge against the county, the county commissioners have no power to allow it, and its allowance would neither bind nor estop the county; as, for example, where the commissions of a collector of taxes are fixed by statute at a certain rate per cent. and the board allows him a greater rate. But the compensation for every legitimate charge against a county is not fixed by statute, nor even expressly provided for. It is therefore within the functions of the board of county commissioners, in such cases, to allow reasonable compensation.

The county commissioners represent the county, and have charge of its property and the management of its business concerns. They are necessarily vested with reasonable discretion in the administration of county affairs.

Now, with these principles in view, let us turn to the case of a county assessor who is unable to perform all the work of his office, but whose county has not been divided into assessment districts. No power is conferred on the assessor to create such districts, nor can he appoint deputy assessors until such districts are created. Some discretion is lodged in the board of commissioners as to when the necessity arises for such division of the county. It may be that an assessor may be able to perform all the responsible official work of making the assessment, and merely require mechanical or clerical assistance to complete his work within the time prescribed by law. In a pecuniary point of view, this course may be highly advantageous to the county in the saving of unnecessary expenses. Although such a case is not covered by the express provisions of the statute, it is covered by its implied provisions. The spirit of the statute is that a county shall pay for such assistance as is actually necessary. It is proper to consider the consequences of a contrary view. It appears from the record in the present case that it was found necessary to employ from twelve to fourteen clerks in the assessor's office of Arapahoe county in order to dispose of the work as required by law. It not being through any neglect or default of the assessor that the county was not divided into districts, which would have authorized him to appoint deputy assessors, instead of clerks, would it not be highly inequitable to require the assessor to bear the expenses thus necessarily incurred? Having paid his clerks, the assessor's right to reimbursement, although not covered by the express words of the statute, would seem to be fairly implied therefrom; also the power of the commissioners to allow

such claim. The services rendered were clearly beneficial to the county, and connected with the county government. The provisions of the statute for the appointment of deputy assessors are a recognition by the general assembly that assistance for the assessor may become a necessity; and, when it does, it will constitute a proper charge against the county. The necessity clearly appears to have arisen in the present instance, and the assessor seems to have pursued the only course open to him, under the circumstances, so far as the employment of help was concerned. Had he attempted to do all the work himself, he could not have complied with that provision of the statute requiring him to have the assessment roll ready for delivery to the collector by a prescribed day. Unless, then, he is to be held responsible for the default of another department, his reasonable expenses, so incurred, constitute a proper charge against the county, they having been incurred for a legitimate purpose connected with the county government.

A variance is claimed to exist between the allegations of the indictment and the proofs concerning the payment to the defendant, and receipt by him, of the money alleged to have been fraudulently obtained from the county. The indictment charges that the defendant, by certain false pretenses which are set out, defrauded the county out of a certain sum of money. On the part of defendant it is contended that the proof does not show that he even ever got a dollar of this money. The evidence shows that the account presented by the defendant, the same being for the sum of \$96, was audited and allowed; that a county warrant for that sum of money, of the par value of \$96, was issued, payable to bearer, and delivered to the defendant; that there was at that time money in the county treasury for its payment; and that it was presented to the treasurer and duly paid by him. The treasurer, however, could not state to whom he had paid the money. The county was clearly defrauded of its money

by the defendant, by reason of the false pretenses alleged. C. M. Farrar, whose name had been used for this purpose, had nothing to do with the transaction and received neither the warrant nor the money. In fact, he did not know that such an account had been presented, nor that a county warrant had been issued or paid, until long afterwards. He had served but seven and one-half days instead of sixteen days, as alleged by defendant, and at a *per diem* of \$4 instead of \$6, as represented by the account filed. Under all the circumstances in evidence, the presumption of facts obtains that the defendant presented or caused the warrant to be presented, and obtained the money.

It is contended that the proof in this particular is insufficient, for the reasons that, the warrant being negotiable by transfer merely, and payable to bearer, defendant may have lost it, and the finder obtained the money, or that a thief may have stolen it, and the treasurer made payment to him. Neither of these suppositions are verified by human experience as a natural or usual result in such case. Such a result being unusual, the presumption of fact is therefore the other way. A presumption of a fact is an inference of the existence of a certain fact arising from its necessary and usual connection with other facts which are known. The principle is recognized in criminal jurisprudence that proof of certain facts may lead irresistibly to the presumption that another act, of which there is no direct proof, was committed or done. Men are presumed to act according to their own interests. It is presumed that regular and ordinary means are adopted for a given end. So where the means calculated to attain a certain end appear to have been adopted, and the end itself appears to have been attained, a particular completion will be presumed. 1 Phil. Ev. *599-*610. In the present instance, the end in view was attained. The means adopted involved several steps, all of which were established by direct proof, except the

presentation of the warrant and receipt of the money by the defendant. But the warrant was worth its face in the market. It was not necessary that defendant should himself present it to the treasurer in order to realize the money, or in order that the county should be defrauded of its money by the acts of the defendant. No evidence denying the receipt of the money was offered, and no explanation of the facts proven against the defendant was given. The point under consideration, therefore, falls within the rule that when the nature of the case admits of explanation or contradiction, and enough has been proven against a party to warrant a reasonable conclusion against him in the absence of explanation or contradiction, and none is offered, the law warrants the adoption of the conclusion to which the proof tends.

But, in addition to the inference deducible from the facts mentioned, the confession of the defendant, made to the board of commissioners after the transaction specified in the indictment, was before the jury. He therein admitted that he had been thus imposing on the county for the past three or four years and had realized thereby, as nearly as he could estimate, about \$3,108. The verdict appears to have been duly warranted by the evidence.

Other objections to the proceedings are discussed, none of which we deem fatal, and, upon a review of the entire record and the errors assigned, we are of the opinion that no sufficient errors appear therein to warrant a reversal of the judgment. It is therefore affirmed.

Affirmed.

BARNES ET AL. V. BEIGHLY.

1. A bill will not lie by a judgment creditor for discovery, and to have land in another county than that in which the judgment was rendered, alleged to be held in trust for the judgment debtor, who is residing on such land, made subject to the judgment, where the judgment has not been made a lien upon the land claimed to be

9	475
11	109
9	475
1a	38
9	475
5a	129
9	475
23	538
9	475
20a	247

subjected by filing a transcript of the judgment with the recorder of the county in which the land is situated.

2. On a creditor's bill seeking to have property alleged to have been purchased with the money of a judgment debtor, and to be held in trust for him, made subject to a judgment, where the defendants charged with collusion answer on oath denying the charges, and such denials are not contested by the plaintiff by any evidence contradictory of the statements therein, but by a general denial, it is error to enter judgment in favor of the plaintiff.
3. In a suit by a judgment creditor for discovery, and in aid of a judgment previously recovered by the same plaintiff, in which defendant alleges that the original judgment is still in force and unsatisfied, and charges collusion with defendant's wife, made co-defendant, in transferring his property to her name, it is error for the court to give a general judgment against both defendants for the amount of the defendant's debt.
4. In a suit for discovery, and in aid of a judgment, in the nature of a creditor's bill, by a judgment creditor, it is error to enter judgment against the debtor, and a co-defendant charged with collusion, for the amount of the former's debt.

Appeal from County Court of Clear Creek County.

THE plaintiff Beighly brought suit in the county court of Clear Creek county, to the November term, 1882, against the defendants, Orpheus I. Barnes, L. H. Barnes and S. A. Gilbert, for discovery, and in aid of a judgment previously recovered in the said court by the same plaintiff against the said Orpheus I. Barnes. The original cause of action was a balance due on account for goods and chattels sold and delivered by the plaintiff to the defendant, the amount of the recovery being \$673.65. The present action was not instituted in pursuance of the code remedy, by proceedings supplementary to execution, but is a proceeding in equity in the nature of a creditor's bill. The bill alleges, among other things, that the original judgment is still in full force and effect, and remains wholly unsatisfied; that the judgment debtor, O. I. Barnes, after the rendition of said judgment, removed to Leadville, Lake county, and engaged in business there in the name of the said L. H. Barnes, his wife, with the

intent and purpose of placing and keeping his money and property beyond the reach of any execution that might be issued on the plaintiff's judgment. It further alleges that the co-defendants, L. H. Barnes and S. A. Gilbert, colluded with said judgment debtor to obstruct the collection of said judgment; that said O. I. Barnes purchased real estate and personal property with his own funds and caused the title thereof to be transferred to his co-defendants, for the purpose of cheating and defrauding the plaintiff in the collection of his judgment. The bill specifies certain real and personal property alleged to be so acquired and held by the co-defendants, charging that no consideration moved from them to the vendors, but that the property is fraudulently held in trust for the use and benefit of said O. I. Barnes. Charges of the same character are made in relation to property alleged to have been owned by said judgment debtor in Gilpin county, during the business transactions which formed the basis of the original judgment, and the proceeds of the sale thereof, it is alleged, were fraudulently transferred to his wife, the said L. H. Barnes. Discovery is sought concerning all these transactions and alleged fraudulent and collusive conduct, with full disclosure as to all property owned by said O. I. Barnes, or in which he is in any manner beneficially interested. Judgment is prayed that the defendants, or some of them, be decreed to pay the plaintiff the amount of said judgment, with interest and costs, and that defendants, or some of them, be adjudged to apply for that purpose any money, property or choses in action belonging to said O. I. Barnes, or held in trust for him, or in which he is in any way interested. Summons was served on O. I. Barnes and L. H. Barnes, and they were the only defendants who appeared to the action. Said defendants answered the bill, denying all the fraudulent conduct charged, and responding to all inquiries concerning the ownership of property, and how the same was derived. The plaintiff filed a replication

traversing the truth of the statements made by the defendants, but offered little testimony contradictory thereof. Upon the hearing, no findings of fact appear to have been made, but the court rendered a general judgment in favor of the plaintiff against said defendants, O. I. Barnes and L. H. Barnes, for the sum of \$1,046.53, and costs.

Mr. W. P. WADE, for appellants.

Mr. L. C. ROCKWELL, for appellee.

BECK, C. J. This is a record of proceedings had in the court below upon a bill filed therein by the appellee in the nature of a creditor's bill. It is earnestly contended on part of the appellants that such a proceeding could not be legally entertained under the laws of this state, on the facts and circumstances set out in the bill. This objection was not raised in the county court, either by demurrer or answer, nor is it here directly presented by any of the assignments of error. We are therefore not called upon to decide this question. But the sufficiency of the bill itself, and of the evidence to support relief in such a proceeding, and the regularity and validity of the judgment rendered, are questions properly before us for adjudication.

We do not hesitate to say that the bill is defective. It sets out, among other things, that the judgment sought to be enforced was rendered by the county court of Clear Creek county; that the judgment debtor and his co-defendants are residents of Lake county; and that the judgment debtor purchased real estate and personal property in the latter county with his own funds, taking the title in the names of his co-defendants, "for the purpose of cheating, hindering and defrauding the plaintiff in the collection of his said judgment." Real estate and personal property is described which is alleged to be so held. The bill avers the issue of execution to Lake

county, and its return *nulla bona*, but it does not aver that any steps have been taken to make the judgment of the county court of Clear Creek county a lien upon the property of the judgment debtor in Lake county.

If the allegations of the bill are true, the property mentioned is in fact held in the name of other persons for the use of the judgment debtor. This would constitute a resulting trust therein in his favor, if the transaction had been *bona fide*. But the transfers having been made for a fraudulent purpose, participated in by the grantees as well as the debtor, the only trust capable of enforcement results in favor of the creditors of the latter party.

Under our statutes all equitable interests in property are subject to levy and sale on execution. Gen. St. §§ 1835, 1883. For the purpose of acquiring a lien on any real estate owned by a judgment debtor, or which he may acquire after judgment, situate in a different county from that in which the judgment is entered, it is provided by section 1839 that the creditor may file a transcript of his judgment with the recorder of such county. This does not appear to have been done in the present case. The doctrine established by the authorities is that the judgment must be a lien on the real estate sought to be subjected to sale on execution through the aid of a creditor's bill. *Newman v. Willetts*, 52 Ill. 99; *Cornell v. Radway*, 22 Wis. 260; *Evans v. Hill*, 18 Hun, 464; 2 Wait's Act. & Def. 414, § 3.

In respect to the evidence, we are of opinion that it was insufficient to support a judgment against the defendants. The plaintiff in his bill called upon them to answer as to the interest of the judgment debtor in all the property described, or in any manner referred to, in the bill, including all trusts and equitable interests held by or in the names of said co-defendants for the benefit or use of the judgment debtor, or in which he was interested directly or indirectly. Full discovery was prayed

as to said matters, and the defendants were called upon to state and set forth, as to the property described, the particulars of sales and purchases, the consideration actually paid, who paid the same, and who had the use and profits thereof since the purchase. The answers to these inquiries were necessarily made under oath. All acts of collusion, and all fraudulent efforts to conceal property or assets of the judgment debtor, or to hinder, delay or defeat the collection of the plaintiff's judgment, were positively denied. It was also positively denied that the judgment debtor had any interest in the property mentioned, beneficial, in trust or otherwise, or in any property held by said co-defendants. The answers filed were responsive to the discovery sought by the bill; the defendants stating, in some instances, as they had a right to do, the circumstances under which certain property was acquired. The truth of these answers was not contested by the plaintiff by any evidence that can be regarded as contradictory of the statements made therein. The replication of the plaintiff filed thereto neither operated to sustain the charges made in the bill nor to require extrinsic proof in support of the denials thereto contained in the answers. The plaintiff was not concluded by these answers, and might have introduced evidence showing them to have been untrue; but, in the absence of evidence contradicting the statements of the defendants in relation to the matters whereof discovery was sought, it was error to render judgment in favor of the plaintiff.

We are also of opinion that the judgment rendered was irregular, and not warranted by law. It was a joint judgment against O. I. Barnes, the judgment debtor, and L. H. Barnes, the only co-defendant served with process. It gives no relief as to any of the property, real or personal, described in the bill, and alleged to have been fraudulently transferred and held so as to place the same beyond the reach of the plaintiff's execution, but is a general judgment against the defendants served with process,

for a sum of money, to wit, the sum of \$1,046.53. What items entered into the computation by which this result was reached the record does not disclose; and since the bill avers that the original judgment still remains in full force and effect, and as this action was not instituted to revive that judgment, there was no warrant of law for entering a second judgment for the same cause of action already merged in the first judgment.

Another fatal objection is that a general judgment for the same cause of action is foreign to the nature and purposes of a creditor's bill. Equitable jurisdiction cannot be invoked for relief of this character. *Miller v. Scammon*, 52 N. H. 609; 1 Pom. Eq. Jur. § 230; Story, Eq. Pl. § 473.

It was error, in any view of the case, to enter judgment against the defendant L. H. Barnes jointly with the judgment debtor, for the amount of the latter's debt, in an action ostensibly brought in aid of an existing judgment. If the defendant L. H. Barnes held title to property belonging to the judgment debtor, or in which he was beneficially interested, as averred in the bill, the province of the court, in a proper case, would be to decree that such property, or the debtor's interest therein, be subjected to the satisfaction of the plaintiff's judgment. The scope of this remedy is to cancel and remove fraudulent conveyances, to set aside fraudulent assignments, and to appropriate and apply to the satisfaction of the judgment equitable assets of the judgment debtor.

There may be other errors in the proceedings, but inasmuch as no sufficient abstract of the record was made and filed by the appellants, as required by our rules, and since counsel for the appellee has not seen fit to discuss the errors assigned, we are not disposed to consider all of the sixteen errors assigned on the record.

For the reasons given the judgment must be reversed.

Reversed.

9	482
13a	62
9	482
34	226

MURRAY V. MARSHALL.

1. An innkeeper is bound to take extraordinary care. His responsibility approximates to insurance whenever the thing brought to the inn has been confided, expressly or by implication, to his keeping.
2. Where a guest, on leaving a hotel, without the intention of returning as a guest, but without paying his bill, leaves his valise in the charge of the hotel clerk, and returns within forty-eight hours, the innkeeper is liable as a bailee for want of ordinary care, and the loss of the valise raises a presumption of negligence against him.

Error to County Court of Fremont County.

THE evidence shows that on the night of the 25th of October, 1880, Marshall, the defendant in error, registered at the McClure House, in Canon City, of which Murray, the plaintiff in error, was proprietor. He registered his name, and was assigned to a room by the clerk, to which he retired, taking his valise with him. The next morning (the 26th) he came down to the office of the hotel, and handed his valise to the clerk, telling him that he would call for it. The clerk took the valise, and put it behind the counter. On the morning of the 28th, he returned to the hotel, paid his bill, and demanded his valise. It could not be found. The value of the valise and its contents amounted, in the aggregate, to \$47.45, for which sum the court below gave judgment. To reverse this judgment, plaintiff in error sued out this writ.

Mr. GEORGE C. NORRIS, for appellant.

Mr. AUGUSTUS MACON, for appellee.

ELBERT, J. An innkeeper is bound to take extraordinary care. His responsibility approximates to insurance whenever the thing brought to the inn has been confided, expressly or by implication, to his keeping. Schouler, Bailm. 262. No question is made respecting the liability

of the innkeeper as stated, but counsel insist that the liability of Murray, the plaintiff in error, ceased when Marshall, the defendant in error, left his hotel, leaving his valise in his care; that thereafter he was a bailee without compensation, and liable only for gross negligence.

It is said generally that, after the relation of guest ceases, the innkeeper appears liable only as an ordinary bailee, gratuitous or otherwise, for the inanimate goods his departing guest may have left in his care, unless strict proof be furnished of a different understanding. Schouler, Bailm. 270, and cases cited. Mr. Wharton, in his work on the Law of Negligence (section 687), says: "It is an interesting question how long, when a guest leaves his baggage with an innkeeper, the innkeeper is liable, as innkeeper, for such. Judging from the analogy obtaining as to common carriers, we would conclude that the exceptional and onerous insurance liability of the innkeeper would not continue after the guest had permanently left the inn, allowing, of course, for a few hours which may be necessary for porters to effect a removal." At the same time he cites "as not without weight" the case of *Adams v. Clem*, 41 Ga. 67. In the case cited the guest departed from the inn, leaving her trunk in the possession of the innkeeper, with his consent, to be called for. Upon the following Friday the trunk was called for, but the plaintiff in error had lost it in the meantime, and could not deliver it, nor could he show any diligence in taking care of it. Brown, C. J., says: "We think, in such case, that an innkeeper, with whom the baggage of his guest is left, with his consent, though he gets no additional compensation for taking care of it, is still liable for it as innkeeper, for a reasonable time, to be estimated according to the circumstances of the case, after which he would be only a bailee without hire, and liable as such. We are not prepared to say that the time was unreasonable which intervened

in this case before the guest sent for her baggage." The doctrine of this case seems to rest largely upon the fact that the baggage of the guest was left "with the consent" of the innkeeper; that from his acts, under the circumstances of the case, a contract is to be implied by which the innkeeper consents to continue his liability as innkeeper for a reasonable time. The case of *Giles v. Fauntleroy*, 13 Md. 138, is an authority for saying that the profit which the innkeeper derives from the entertainment of the guests affords a consideration for an undertaking in some respects similar. The court say: "The baggage was that of a guest, who, after paying his bill, was entitled to the use of his room for the whole day. The agent of the landlord undertook to keep the trunk until 4 o'clock, and then send it to a particular steamer. And such an undertaking, it seems, was consistent with what a traveling guest had a right to expect, in accordance with the rules and usage of the house. Conveniences and facilities held out to travelers are matters which influence them in selecting hotels for their accommodation, and the profits which innkeepers derive from the entertainment of their guests afford considerations for such undertakings as the one here alleged."

Departing guests not infrequently leave baggage in care of the innkeeper for a few hours or a few days, to be called for or to be forwarded to some designated destination. The great increase of modern travel creates an increased demand for more extensive accommodations in this respect. With a view of influencing travelers in selecting their hotels, innkeepers, more or less, generally respond to this demand, and provide increased accommodations, and assume voluntarily duties respecting the baggage of guests thus left in their charge. In such case, if the liability of the innkeeper is that of bailee without compensation, guests are left with little or no protection. The cases cited show a tendency to enlarge it.

In the case at bar, the defendant in error left on the

morning of the 26th, and returned on the morning of the 28th, an absence of about forty-eight hours. While it appears from his testimony that he did not at the time expect to return to the hotel as a guest, it also appears that he did not pay his bill upon departing from the hotel, but left it unpaid until the morning of the 28th, when he returned to get his valise. He paid his bill, but the plaintiff in error was unable to deliver or account for his valise. Under the facts, we think he should be held liable. The baggage was left with his consent, and the time was not unreasonable. In addition to this, for the unsettled bill of the defendant in error the law gave the plaintiff in error a lien upon the baggage left in his care. Whether the baggage was left and retained with such a view does not affirmatively appear, nor is it necessary to the lien that it should. We must treat the baggage as having that *status* which the law assigns it in the absence of anything showing that the plaintiff in error waived his right to the lien. His *lien* as an innkeeper would seem to involve a concession of his *liability* as an innkeeper, since the law gives the lien on account of his extraordinary liability. *Grinnell v. Cook*, 3 Hill, 485. If the fact that the defendant in error had departed without any intention of returning in the character of guest can be said to affect this proposition, then the *status* of the plaintiff in error was that of a bailee holding property upon which he had a lien as security for a sum due. In this character he was bound to ordinary diligence and ordinary care, and upon the demand of the baggage by the defendant in error it was not sufficient to say that it had been lost, or that he supposed it had been carried off by some drummer. The loss, under such circumstances, is *prima facie* evidence of negligence, and it lays with the pawnee to destroy the presumption. 2 Kent, Comm. 581; Schouler, Bailm. 192; *Murray v. Clarke*, 2 Daly, 102.

The judgment of the court below is affirmed.

Affirmed.

JAMES V. MCPHEE, ASSIGNEE.

9	486
12	348
9	486
10a	358
9	486
28	284
9	486
30	286

1. An answer which alleges merely that defendant "has not and cannot obtain *sufficient* information on which to base a belief" as to whether the facts stated in the complaint are true, is objectionable.
2. An answer which confines itself to denying *in ipsiis verbis* the allegations of the complaint, and does not attempt to deny their substance or spirit,—*e. g.*, a denial that *all* a debtor's property was assigned to the plaintiff suing as an assignee, or that defendant *requested* plaintiff to deliver the goods, the price of which is sued for,—is bad as being evasive, and tendering immaterial issues.
3. In an action by an assignee under an assignment for the benefit of creditors, an allegation by defendant in his answer that the assignment was not *bona fide*, but was in fraud of creditors, where defendant does not allege that he is a creditor of the debtor, or held any relation to him that would entitle him to call in question the *bona fides* of the assignment, is not pertinent to the issue of defendant's indebtedness.
4. An answer which is defective in itself may be cured by the plaintiff's reply, so as to raise an issue on which trial may be had, and in such case it is error to render judgment for the plaintiff on the pleadings.
5. In an action by an assignee under an assignment for the benefit of creditors for goods sold and delivered after the assignment, the defendant cannot plead an indebtedness of the assignor as a set-off.

Appeal from District Court of Arapahoe County.

JUDGMENT in the court below for the plaintiff on the pleadings. Appeal to the supreme court.

"COMPLAINT.

"And now comes the above-named plaintiff, and by leave of court, by his amended complaint, states the following facts constituting his cause of action against said defendant: That heretofore, to wit, on the 25th day of September, 1880, the said R. P. McDonald did assign all his property, both real and personal, for the benefit of all his creditors, to said plaintiff, and that, on or about the 17th day of April, 1881, and prior to the commencement of this suit, the said plaintiff, as such assignee, at

defendant's instance and request, sold and delivered unto said defendant three hundred and eighty-six thousand two hundred and nine burnt brick at the agreed price of \$9.25 per thousand; that the said brick, so delivered to said defendant, amount, at the said agreed price, to the sum of \$3,572.43, and that said brick were reasonably worth said sum, and that defendant promised and agreed to pay said sum therefor; that said defendant has not paid said sum, nor any part thereof, except the sum of \$3,074.79, and that there is now due and owing to said plaintiff from said defendant, for said brick, the sum of \$497.64, together with interest thereon from the said 17th day of April, 1881, at ten per cent. per annum. Wherefore plaintiff demands judgment against said defendant for said sum of \$497.64, together with interest thereon, as aforesaid, and costs of this action."

"ANSWER.

"The answer of Robert L. James to the amended complaint herein alleges: *First.* That the defendant has not and cannot obtain sufficient information upon which to base a belief as to whether, at the time mentioned, or at any other time, one R. P. McDonald assigned all his property for the benefit of his creditors to plaintiff. *Second.* Defendant denies that on or about the 17th day of April, 1881, or at any other time, he requested plaintiff to deliver him three hundred and eighty-six thousand two hundred and nine burnt brick at any price whatever. He denies that he agreed to pay the sum of \$3,572.43, or that he agreed to pay any sum to plaintiff on any account whatever, except as hereinafter shown. He denies that he is indebted to plaintiff in the sum of \$497.64, or in any sum whatever.

"And, for second defense, defendant says that the plaintiff has no authority to bring this suit; that he is not the legal owner of the claim upon which this suit is brought; that the said R. P. McDonald had no right to

make an assignment; that he did not in fact make a *bona fide* assignment of all his estate, both real and personal; that said R. P. McDonald was not insolvent, nor did he have any legal right to make an assignment of all his estate or any part thereof, at the time and in the manner set up in the amended complaint herein; that said assignment, if any assignment was attempted to be made, was made in fraud of the creditors of said R. P. McDonald; that if said assignment was made as alleged, it did not confer upon the assignee any legal right to sell the property of said R. P. McDonald on a credit. And defendant says that he is not indebted to plaintiff, as assignee or otherwise, in any sum whatever, and says he is not indebted to R. P. McDonald in any sum whatever.

“ And for a third defense, and by way of recoupment, defendant says that on the 15th day of December, 1880, he entered into a written agreement with C. D. McPhee, whereby said McPhee bound himself to deliver to defendant, at the corner of Sixteenth and Welton streets, Denver, four hundred thousand bricks, which were to be ‘well burned and merchantable,’ and in which were to be included ten per cent. of stock brick; and by said agreement said brick were to be taken as they come in the kiln, except the top-worked soft course; whereas, in truth and in fact, said McPhee only delivered to this defendant three hundred and eighty-three thousand two hundred and nine brick, and that said brick so delivered were not well burned and merchantable, nor did said McPhee deliver to the defendant ten per cent., or any per cent., of the four hundred thousand of stock brick, nor were the bricks taken as they come in the kiln, but in truth and in fact so many were of an unmerchantable and badly-burned character, and in consequence of no stock brick being delivered at all (of all of which this defendant frequently complained to plaintiff), that this defendant was compelled, after much delay, trouble, annoyance and expense, to purchase suitable brick else-

where. Whereby and in consequence of the failure to carry out his contract, this defendant was damaged in the sum of \$500, and for which sum he prays judgment against the said C. D. McPhee, and for costs of this suit.

"And for a fourth defense, by way of set-off and counter-claim, defendant alleges that R. P. McDonald, the pretended assignor of plaintiff, is indebted to the defendant in the sum of \$258.30, with interest at ten per cent. per annum from this date, and for which sum this defendant prays judgment should the court hold that plaintiff is the legal assignee of said R. P. McDonald, with power to sue and be sued. And, at any rate, defendant prays judgment against the plaintiff for the sum of \$500, with interest at the rate of ten per cent. per annum on said sum since the 5th of March, 1881, the same being the amount due this defendant under the third defense herein, and for costs of this suit."

"REPLICATION.

"And now comes the above-named plaintiff, and replies to the third defense in the answer of the said defendant, and says that after the plaintiff had delivered three hundred and eighty-six thousand two hundred and nine brick at the place mentioned in said answer, that the defendant requested the plaintiff not to deliver any more brick to him, and said to plaintiff that he had all he wanted, and that he would not receive any more, and that, in obedience to the orders, directions and requests of said defendant, the plaintiff stopped the delivery of brick. And plaintiff denies that the brick, or any part thereof, delivered to said defendant were unmerchantable or badly burned, and denies that the brick were not taken as they come in the kiln, and denies that he failed to deliver ten per cent. of stock brick. And plaintiff avers that all of the brick so delivered to the defendant as aforesaid were good, well-burned, and merchantable brick, and that they were the kind of brick, in every

particular, that said plaintiff had agreed to sell, and that said defendant had agreed to buy from the said plaintiff as aforesaid. Wherefore the plaintiff prays judgment, as he has heretofore prayed in his said complaint."

Messrs. J. M. ELLIS and ISHAM HOWZE, for appellant.

Mr. J. P. BROCKWAY, for appellee.

ELBERT, J. The court below rendered judgment for the plaintiff upon the pleadings. Was this error? is the only question presented. The answer set up four defenses, which we will consider in their order.

1. In answer to the allegation of the complaint that on the 23d of September, 1880, R. P. McDonald did assign all his property, both real and personal, for the benefit of his creditors, to the plaintiff, the defendant alleges that he "has not and cannot obtain sufficient information upon which to base a belief as to whether, at the time mentioned, or at any other time, one R. P. McDonald assigned all his property for the benefit of his creditors." The provision of the code (section 57) is that, "in denying any allegation of the complaint, not presumptively within the knowledge of the defendant, it shall be sufficient to put such allegation in issue for the defendant to state, as to any such allegation, that he has not and cannot obtain sufficient knowledge or information upon which to base a belief." This contemplates a denial of either knowledge or information upon which to base a belief. Of such provisions Mr. Pomeroy says: "The formula prescribed by the statute should be exactly followed, not because there is any value in the form simply as such, but because in no other manner can the defendant satisfy the demands of the code and raise a substantial issue,—an issue which is not a subterfuge and pretense. * * * He must deny that he has any knowledge or information, concerning the matter alleged, sufficient to enable him to form a belief respecting

it." Pom. Rem. § 640; Bliss, Code Pl. § 326. The denial is objectionable for another reason. It is a denial of the letter, and not a denial of the substance and spirit, of the allegation. The allegation of the complaint is that McDonald assigned *all* his property, both real and personal, to the plaintiff. Proof that substantially all the property of the assignor was assigned supports the allegation. Burrill, Assignm. § 122. The denial is that he assigned *all* his property, and proof of any piece of property, however insignificant, unassigned, maintains the issue made by the defendant, and satisfies his conscience in making the oath to his answer. It is a traverse *in ipsius verbis*, using exactly the language of the allegation traversed, and no more. It is pregnant with the substantial admission of the allegation, the letter of which it alone denies. Pom. Rem. § 618; Bliss, Code Pl. § 332.

In the second paragraph of this defense the defendant denies that on or about the 17th day of April, 1881, or at any other time, he *requested* the plaintiff to deliver him three hundred and eighty-six thousand two hundred and nine burnt brick at any price whatever. This, also, is evasive, and tenders an immaterial issue. It is not a denial of the allegation of the complaint that on or about the 17th day of April, 1881, the plaintiff, as such assignee, at defendant's request, sold and delivered to the said defendant the amount of brick named.

In the third paragraph of this defense the defendant denies "that he agreed to pay the sum of \$3,572.43, or to pay any sum, to the plaintiff on any account whatever, except as hereinafter shown." This denial is supposed to have reference to the third defense; and, if of any value, it is as a part of that defense. As an independent denial it is evasive and insufficient. The allegation of which it purports to be a denial is that "the brick delivered amounted to \$3,572.43, and were reasonably worth said sum, and defendant agreed to pay said sum therefor, but

has not paid any part thereof, except \$3,074.79, and there is now due \$497.64, with interest from the 17th of April, 1881, at ten per cent." The requirement of the code is that "the answer shall contain a specific denial of each allegation in the complaint intended to be controverted by the defendant." The denial in question is in no sense specific. It is not even as broad as the general issue of *non assumpsit* at common law, namely: "That the defendant did not undertake or promise in the manner and form as the plaintiff hath complained against him." It is of the same character as the next allegation, in which the defendant denies that he is indebted to the plaintiff in the sum of \$497.64, or in any sum whatever. A denial of indebtedness or of liability, without denying the allegations of fact from which the indebtedness or liability is claimed to have arisen, is a nullity. Pom. Rem. 674; Bliss, Code Pl. § 325.

We have thus examined every allegation of the first defense, and, whether taken singly or together, they constitute no plain, direct denial of the facts alleged in the complaint constituting the plaintiff's cause of action. They are clearly evasive, and leave the clear impression that the defendant was not prepared to deny, under oath, plainly and unequivocally, the facts which constituted the plaintiff's cause of action. We think the court was justified in treating it as insufficient.

2. In considering the second defense, it will be noticed that most of the allegations are conclusions of law and not well pleaded. The allegation that the assignment of McDonald was not *bona fide*, and in fraud of the creditors of McDonald, is not pertinent to the issue. The defendant does not allege that he was a creditor of McDonald or held any relation to him that would entitle him to call in question the *bona fides* of the assignment. Burrill, Assignm. 673.

3. It will be noticed that the third defense interposed by the defendant is by way of recoupment. It is defect-

ive in several particulars, chiefly in that it alleges a contract with plaintiff, apparently personal, and not in his character as assignee, and in that it fails to allege that it is the same contract under which the brick mentioned in the complaint were delivered to the defendant. We think, however, that the defective pleading is aided by the reply, which assumes and proceeds upon both of the propositions mentioned. The case is substantially within the rule, "If one of the parties expressly avers or confesses a material fact before omitted on the other side, the omission is cured." Gould, Pl. § 192, p. 154. We think that the third defense and the reply thereto formed an issue which should have been tried, and that the court erred in rendering judgment for the plaintiff on the pleadings. The judgment of the court below is reversed and the cause remanded for trial, with leave to the parties to amend their pleadings if they shall be so advised. In view of the new trial we notice the fourth defense.

4. In his fourth defense the defendant alleges that R. P. McDonald, the pretended assignor of plaintiff, is indebted to the defendant in the sum of \$258.30, with interest, etc., for which sum he prays judgment. If this defense could be allowed, there is no sufficient statement of the nature and character of the indebtedness. We do not understand that in an action by the assignee for goods sold and delivered after the assignment that the defendant is at liberty to plead an indebtedness of the assignor as a set-off. It would be in prejudice of that ratable distribution among all the creditors of the assigned estate contemplated by the assignment. Burrill, Assignm. 556; *Bateman v. Connor*, 6 N. J. Law, 104. Judgment reversed

Reversed.

BRISBOIS V. LEWIS.

In an action by the assignee of a promissory note to recover on the note, the plaintiff, in stating his cause of action, omitted to state that the note sued on was due, by the terms thereof, at the time of bringing the action. The defendant interposed no objection on account of this omission till the plaintiff's testimony was closed, but pleaded that the assignment was fraudulent and made by the payee in order to escape a set-off which defendant had against him, and that the note was obtained through fraud, of which plaintiff had notice. *Held*, plaintiff could amend his complaint by the addition of an allegation that the note sued on was due "in six months after the day of the date thereof," and that the court could require defendant to answer such amended complaint *instantly*.

Appeal from County Court of Lake County.

Two objections are raised by the appellant to the regularity of the proceedings below, and it is insisted that the alleged errors are so prejudicial to the rights of the appellant as to require a reversal of the judgment of the county court. The suit was instituted January 8, 1883, by the appellee Lewis, as assignee of a promissory note executed by the appellant on the 21st day of March, 1882. This note in terms promises to pay, to the order of one George S. Curtis, the sum of \$200, six months after its date, with interest thereon at the rate of one per cent. per month, the interest to be paid monthly. The plaintiff, in stating his cause of action in the complaint filed, omitted to aver that the note sued on was due, by the terms thereof, at the time of bringing suit. No objection on account of this omission was interposed by the defendant, in any manner, until the close of the plaintiff's testimony on the trial. The defendant answered the complaint, admitting the execution and delivery of the note to Curtis as alleged in the complaint, but denied the good faith of its assignment to the plaintiff. He averred that Curtis was still the owner of the note, and that the pretended assignment was made without con-

sideration; that the assignment was fraudulent, and executed for the purpose of enabling Curtis to collect the note without affording the defendant an opportunity to interpose an offset or cross-demand which he held against said Curtis, exceeding in amount the amount of the note, principal and interest. Defendant also averred that the note was obtained by Curtis through fraud and misrepresentation, and that plaintiff had notice of these frauds at the time of the assignment. The plaintiff filed a replication, traversing the averments of the answer relating to the bad faith of the assignment of the note, and the plaintiff's knowledge of the alleged defenses existing in favor of the maker. Upon the issues thus framed, the parties entered upon the trial of the cause. Both Curtis and the plaintiff testified that the assignment of the note was made in good faith, for a valuable consideration, and before its maturity. Plaintiff then rested, when the defendant's counsel stated to the court that plaintiff was entitled to judgment only for the amount which appeared to be due by the allegations of the complaint, which would be the monthly instalments of interest that had accrued since the execution of the note. Thereupon plaintiff's counsel moved to amend the complaint by an averment that the note was payable six months after date, and was due. This amendment was allowed, against the objection of the defendant, who then asked leave to answer the amended complaint in twenty days. The court denied this motion, and ordered the defendant to answer the same *instanter*, which he declined to do. The note was then admitted in evidence, over the objections of the defendant. No evidence was offered on the part of the defendant, and judgment was rendered for the plaintiff for the principal sum named in the note, together with the accrued interest.

Mr. W. P. WADE, for appellant.

Messrs. ROLLINS and TEMPLAR, for appellee.

BECK, C. J. Two rulings of the county court are relied upon by Brisbois, who was defendant below, as sufficient grounds for reversing this judgment. The first permitted the plaintiff to amend his complaint on the trial by the addition of an allegation that the note sued on was "due in six months after the day of the date thereof;" the second denied the defendant's motion for twenty days' time to answer the complaint as amended, and required him to answer the same *instantly*. It is argued that these rulings constitute an abuse of judicial discretion. We think otherwise, for the reasons that the issues were not changed by the amendment of the complaint, and consequently the defendant cannot be said to have been taken by surprise, or prejudiced thereby. The original complaint, notwithstanding the defect, advised the defendant that the object of the action was to obtain judgment for the full amount of the note. The defendant, aware of the plaintiff's omission to allege the maturity of the note, appears to have saved up the objection to be sprung on the trial, and answered fully to the merits of the cause of action. His principal defense consisted of a cross-demand against Curtis, the payee of the note, exceeding in amount the amount of the note. In order to avail himself of this defense as against the plaintiff Lewis, he attacked the good faith of the assignment, and alleged that the note still belonged to Curtis. The amendment of the complaint in no manner prejudiced this defense. It did not even necessitate an amendment of the answer. If an amendment of that pleading was necessary, it did not arise from the cause or ruling complained of. The real grievance of the defendant appears to be that the court defeated his scheme to compel the plaintiff to submit to a nonsuit, or to take a judgment for interest only. Withholding all objections to the complaint until the plaintiff had introduced his testimony in chief, he then points out the defect, which the court very properly allowed to be cured by an immedi-

ate amendment of the complaint, so as to include the plaintiff's whole cause of action.

We are of opinion the errors assigned are without merit, and that the rulings complained of are within the spirit of the code provisions relating to amendments of pleadings, especially section 81, p. 24, Civil Code, 1883.

The judgment is affirmed.

Affirmed.

McMURTRIE V. RIDDELL.

1. In this state a pre-existing indebtedness is a sufficient consideration to support a purchase of real estate, either at private or judicial sale, and the person so purchasing will be regarded as a *bona fide* purchaser. Such transactions are, however, subject to the same tests as to good faith and regularity generally as are other contracts and sales.
2. A deed of land which is executed before a judgment is rendered against the owner, but is not recorded until after a judicial sale of the land is had under the judgment, and the sheriff's certificate of sale is recorded, though recorded before the recording of the sheriff's deed, at the expiration of the period of redemption, will not, under Gen. St. § 215, avail against the purchaser at the judgment sale without notice; the record of the sheriff's deed relates back to the record of the certificate of sale.

Error to District Court of San Juan County.

THIS was an action brought by Riddell against McMurtie, to remove a cloud from the title held by plaintiff to certain lots in the town of Silverton, in San Juan county. Riddell claims to have acquired title, through a judicial sale, against one Wightman, their former owner. It was admitted on the trial of the present action that the plaintiff recovered a judgment against said Wightman in the district court of San Juan county for the sum of \$500, and costs of suit, September 27, 1880; that execution issued, and was levied on said lots as the property of Wightman, October 19, 1880; and that the same were

9	497
9	610
9	497
1a	140
2a	284
9	497
22	41
22	180
6a	221
9	497
11a	484
12a	480
9	497
15a	128
15a	124
9	497
18a	519

duly sold as the property of said judgment debtor, November 15, 1880, and purchased by the plaintiff, his bid being credited upon the execution, and not otherwise paid; also that the sheriff, on making said sale, issued to the plaintiff a certificate of purchase, who caused a copy thereof to be recorded as required by statute. Upon the expiration of the time for redemption, none of the lots having been redeemed from said sale, a sheriff's deed therefor was executed to the plaintiff, bearing date August 16, 1881, which was recorded September, 16, 1881. The title of record stood in the name of the judgment debtor, Wightman, until August 10, 1881, when a deed from him to the plaintiff in error, McMurtrie, was filed for record, the same being dated and acknowledged December 22, 1879. This is the deed which constituted the alleged cloud on plaintiff Riddell's title. The plaintiff denied all knowledge of this deed, actual or otherwise, prior to the date of its record, August 10, 1881, and therefore prayed that it be declared void as to him, and canceled of record. The answer admits most of the allegations of the complaint, but makes the following points by way of defense, viz.: That Riddell paid no *new* consideration for said lots when he bought them at the sheriff's sale, his bid being credited on his execution, and that Wightman was not the real or lawful owner of the lots at the time of the levy of plaintiff's execution, October 19, 1880. The answer avers that Wightman was the owner in fee-simple on December 22, 1879, and that he sold and conveyed them to the defendant on that day, in consideration of the sum of \$800, which sum the defendant paid at the time, of which transaction the plaintiff had notice prior to his purchase at the sheriff's sale; that the lots are unimproved and uninclosed, and have never since the 22d day of December, 1879, been actually occupied by either plaintiff or defendant. The principal part of the foregoing allegations of complaint and answer are then set out by the defendant by way of cross-com-

plaint. The latter pleading alleges that the judgment on which the lots were sold to the plaintiff never became a lien on the property, and it alleges that the certificate of sale and sheriff's deed to said Riddell constitute a cloud on defendant's title, which he asks to have removed. Riddell answered the cross-complaint, denying the title therein set up in McMurtrie; and, the cause having been submitted to the court upon the allegations of the parties and the evidence, the issues were found for Riddell, and a decree granted in accordance with the prayer of his complaint, at the June term, 1883.

The bill of exceptions shows that the following facts were admitted on the trial by both parties: The ownership of the lots by Wightman, December 22, 1879; that he sold and conveyed them to the defendant below, on that day, in due form of law; that the defendant did not record his deed until August 10, 1881; the recovery of plaintiff's judgment against said Wightman, September 27, 1880; that no transcript of this judgment was ever filed for record, and no attempt made to make it a lien on the premises in controversy, except by the issuance and levy of an execution as set up in the pleadings; that the premises were sold under the said execution to the plaintiff, November 15, 1880, the amount of his bid being credited upon the execution, and not otherwise paid; that a certificate of sale was given the plaintiff, and by him duly recorded, and that pursuant to said sale a sheriff's deed was executed and delivered to the plaintiff, August 16, 1881. The plaintiff testified that he had no knowledge of the conveyance to defendant, or of any dealings between him and said Wightman, until he went to the recorder's office with his sheriff's deed for record, on the 16th day of August, 1881. The bill of exceptions further shows that it was agreed by the parties, in open court, that, if the court should decide the plaintiff to be entitled to the relief prayed for, it should find that he was in possession of the premises in controversy at the com-

mencement of the action; and, if the finding should be that defendant was entitled to the relief prayed for in the cross-complaint, then it should be found that he was in possession of the lots at the commencement of the suit. The finding and decree was for the plaintiff, and defendant has brought the cause here by writ of error for review.

Messrs. HUDSON and SLAYMAKER, for plaintiff in error.

Messrs. MONTAGUE and BEEBE, for defendant in error.

BECK, C. J. The main point in controversy is whether or not the facts of this case entitle the plaintiff below, Riddell, to the protection afforded by our statute to a *bona fide* purchaser of real estate at a sheriff's sale on execution. There is no controversy about the facts. Those not set out in the pleadings were agreed upon before the court below, and are preserved in the bill of exceptions. The question is, was the plaintiff a *bona fide* purchaser of the lots in controversy, within the spirit and meaning of that term as employed in section 215, p. 175, Gen. St.? This section provides that "all deeds, conveyances, agreements in writing of or affecting title to real estate, or any interest therein, and powers of attorney for the conveyance of any real estate, or any interest therein, may be recorded in the office of the recorder of the county wherein such real estate is situate, and from and after filing thereof for record in such office, and not before, such deeds, bonds and agreements in writing shall take effect as to subsequent *bona fide* purchasers, and incumbrancers by mortgage, judgment, or otherwise, not having notice thereof."

On the part of plaintiff in error it is contended that the judgment never became a lien upon the lots, and for that reason the sale on execution conveyed no title to the purchaser. We think this view of the statute is entirely too narrow to effect the intention of its framers. The

statute was not enacted for the benefit of lienholders and the owners of incumbrances upon real estate only, but for all *bona fide* purchasers as well. Its plain meaning and intent is that no prior unrecorded conveyance or contract, affecting the title to land, shall take effect as to any subsequent *bona fide* purchaser without notice, or as to any one who in good faith, and without notice of a prior unrecorded deed or other instrument, acquires a lien or incumbrance on the same tract of land. It is not material, in order that a purchaser shall be entitled to the protection of this statute, that he shall be a judgment creditor, or that the land purchased shall be sold at sheriff's sale on execution. A simple contract creditor or purchaser may be equally within its terms. If a judgment creditor shall record a transcript of his judgment as soon as the same is entered up, he will immediately acquire a lien upon all his debtor's real estate situate within such county, and all that he may subsequently acquire during the existence of the lien, and which may not be exempt from execution. No subsequent transfer or incumbrance thereof by the debtor can prejudice the rights of such creditor.

In the case at bar this precaution was not taken. The judgment, therefore, did not become a statutory lien upon the real estate in question. But the deed from Wightman to McMurtrie not being recorded prior to the sheriff's sale, and Riddell having purchased the lots thereat without notice of this unrecorded conveyance, he occupies the position of a subsequent *bona fide* purchaser without notice.

A labored effort has been made to demonstrate that a judgment creditor who purchases property at sheriff's sale under his own judgment, and who pays no new consideration, but whose bid is merely credited upon the execution, is not a *bona fide* purchaser within the meaning of this statute. This is not an open question in this state, whatever diversity of judicial opinion may exist else-

where. The contrary rule was announced by this court in *Knox v. McFarran*, 4 Colo. 586, 596. That was an action of ejectment wherein two creditors of the same debtor were parties. They had both taken in payment of their respective demands the same town lot; Knox by a voluntary conveyance, and McFarran by a judicial sale. McGovney, the debtor, held a title bond for the lot in controversy, executed by one Rose, the owner in fee, and which bond McGovney assigned to Knox, as cashier of the First National Bank of Colorado Springs, in payment of a debt due from him to the bank. This assignment was made December 10, 1875, and on January 6, 1876, Rose executed a deed to Knox, as trustee for the bank, which was duly recorded. McFarran recovered a judgment against McGovney in the district court of El Paso county for the amount of his claim, \$550, December 16, 1875. He filed an abstract of his judgment in the recorder's office of said county, December 27, 1875, and caused an execution to be levied upon the lot in controversy, February 7, 1876. In pursuance of this levy the lot was sold by the sheriff, March 16, 1876, McFarran becoming the purchaser, his bid of \$545 being credited upon the execution. A sheriff's deed was executed to him in pursuance of this sale, February 12, 1877, which was recorded June 8, 1877. One of the questions presented in the ejectment case was the sufficiency of the consideration to support the assignment of the title bond to Knox, and the deed subsequently executed to him. Mr. Justice ELBERT, in announcing the opinion of the court, stated the rule to be as follows: "Although there is a conflict of authority on the question, we regard it as the better doctrine that one who takes property in payment or security of a pre-existing debt is to be regarded as a purchaser for a valuable consideration." Upon a reversal of this cause, McFarran filed a bill in equity in the court below to enjoin the ejectment proceedings; alleging that he could not make his defense therein, and setting up ad-

ditional facts by which it was made to appear that McGovney was in possession of the lot in controversy and was the owner thereof on the 27th day of December, 1875, under a contract for a deed from Rose, when the abstract of McFarran's said judgment was filed for record; that said McFarran had then no information, by record or otherwise, that McGovney had transferred or parted with his interest in said property, the assignment of the title bond not having been placed on record. This bill being demurred to, and judgment having been given on the demurrer, this court held, on appeal from said judgment (5 Colo. 217), that these additional facts changed the equities; that the assignment of the contract to Knox not having been recorded, it did not take effect as against a subsequent *bona fide* purchaser without notice, McFarran being held to be such a purchaser at the execution sale.

It is unnecessary, therefore, for us to review the conflicting authorities on this question. The rule in this state is that a pre-existing indebtedness is a sufficient consideration to support a purchase of real estate, either at private or judicial sale, and the person so purchasing will be regarded as a *bona fide* purchaser. Such transactions, however, are subject to the same tests as to good faith and regularity generally as are other contracts and sales.

In the present case Riddell purchased the lots at sheriff's sale, November 15, 1880. It is conceded that the sheriff issued to Riddell, at the time of the sale, a certificate of purchase; also that a copy thereof was recorded as required by statute, which would be within ten days from the day of sale. All the statutory conditions were complied with, requisite and necessary to vest title in the purchaser at said sale, subject only to the right of redemption provided by law. The quitclaim deed from Wightman to McMurtrie not having been recorded, and the plaintiff having no knowledge of its existence at the

time of his purchase, it had not then taken effect as to him.

Another position assumed by plaintiff in error is that the judgment below was erroneous for the reason that, there being no judgment lien upon the lots in controversy, and McMurtrie's deed being recorded before the sheriff's deed was executed and recorded, the title vested in the plaintiff in error. We know of no principle of law upon which this proposition can be sustained. The validity of the sheriff's sale does not depend upon a judgment lien. It depends upon a valid judgment against Wightman, and the sale by the sheriff of property of which Wightman was the owner under the statute to a *bona fide* purchaser, and the recording of the latter's certificate of purchase. McMurtrie's deed could not take effect for any purpose, as against a *bona fide* purchaser without notice, until it was recorded. This was not done for a period of more than ten months after the certificate of sale to Riddell was recorded, nor until after the expiration of the time of redemption from the sheriff's sale. It is unnecessary to consider whether, under the circumstances of this case, the levy of the plaintiff's execution created a lien upon the lots in controversy. Notice of the plaintiff's purchase and rights was duly given by recording the sheriff's certificate of sale; and although the sheriff's deed to said purchaser was not executed and recorded until a few days after the recording of McMurtrie's deed, yet it is safe to say it then took effect by relation as of the day of sale. Had the plaintiff's judgment been made a lien upon the lots in manner provided by statute, the sheriff's deed would have related back to the inception of the lien. Ror. Jud. Sales, §§ 707, 708, 786.

This doctrine of relation is very fully considered in *Jackson v. Ramsay*, 3 Cow. 75, where numerous authorities are cited in support of the principles announced. The general principle of the doctrine is that, "where there

are divers acts concurrent to make a conveyance, estate or other thing, the original act shall be preferred, and to this the other act shall have relation." In accordance with this doctrine, it is held "that a deed executed in pursuance of a previous contract for the same premises is good, by relation, from the time of making the contract, so as to render valid every intermediate sale or disposition of the land by the grantees." It is held that a government patent for land will relate back to the date of the certificate of purchase, when necessary to sustain a sale made by the grantee, or a judicial sale of his interest in the land. *Carroll v. Safford*, 3 How. 441; *Landes v. Brant*, 10 How. 348.

The doctrine of relation, as stated in 5 Cruise, Real Prop. 510, 511, and quoted by Justice Catron in *Landes v. Brant*, *supra*, is as follows: "There is no rule better founded in law, reason and convenience than this: that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation." See, also, *Lessee of Boyd v. Langworth*, 11 Ohio, 235; *Oviatt v. Brown*, 14 Ohio, 285, and cases cited.

Giving due effect to our recording statute, the substantial act in the case at bar was the sheriff's sale. Wightman was then, by force of the statute, the owner of the lots as to a *bona fide* purchaser at the sheriff's sale. As we have seen, the defendant in error was such a purchaser, and upon the execution and recording of the sheriff's deed, it related back to the date of the sale, and perfected his title.

Perceiving no error in the judgment and decree of the district court, it will be affirmed.

Affirmed.

9	506
17	324
17	485

PEOPLE EX REL. ROGERS ET AL. V. GREEN ET AL. (First Case.)

PEOPLE EX REL. NEWTON V. ROGERS ET AL. (Second Case.)

1. An attorney is liable to be removed from office by this court for sufficient reason and on proper showing. This reason and this showing are not necessarily limited to criminal offenses, or to an act which would create a civil liability.
2. Neither the letter nor the spirit of the attorney's privilege permits him to enter our courts and spread upon the judicial records charges of a shocking and felonious character against brother attorneys, and against judges engaged in the administration of justice, upon mere rumors coupled with facts which should of themselves create no suspicion of official corruption in a just and fair mind.

DISBARMENT proceedings. On rehearing.

On the 16th of June, 1886, Lucius P. Marsh and Merrick A. Rogers filed in this court their petition for a rule upon Thomas A. Green and Horace B. Johnson to show cause why they should not be disbarred. Their petition alleges that on the 17th day of May, A. D. 1886, the said Green and Johnson "filed, and procured and caused to be filed, in the office of the clerk of the circuit court of the United States within and for the district and state of Colorado, sitting at Denver, a certain bill or complaint in chancery, wherein Almon P. Newton and Isabel J. Newton, his wife, are complainants, and Edward F. Lamb and Vira Lamb, J. Jay Joslin, and the Arapahoe Cattle & Land Company are defendants, which said bill of complaint is signed by the said Thomas A. Green and the said Horace B. Johnson, by their own proper hands, as the said complainants' solicitors therein; * * * that in and by the said bill of complaint the said Thomas A. Green and the said Horace B. Johnson falsely, wickedly and maliciously charge and allege that your petitioner Lucius P. Marsh bribed your petitioner Merrick A. Rogers, as judge as aforesaid of the said superior court, to render a certain judgment in the said bill of complaint

mentioned, and that your petitioner Merrick A. Rogers, as judge as aforesaid, accepted and received such bribe, and that he, your petitioner Merrick A. Rogers, was thereby bribed and corrupted, which said false, wicked and malicious charges of bribery and corruption your petitioners humbly crave the leave of this honorable court that they, your petitioners, be not required to more specifically and certainly set out and charge herein, but that, for greater certainty in this behalf, your petitioners have the permission of this honorable court to refer to the said bill of complaint; * * * that the said Thomas A. Green and the said Horace B. Johnson, in and by the said bill of complaint, further charge and allege that your petitioner Lucius P. Marsh, on the next day after the rendition of the said judgment, in a discourse which your petitioner Lucius P. Marsh is alleged to have had with an unnamed non-resident of the said state of Colorado, stated and told to said non-resident that he, the said non-resident, had no idea how cheap judges could be bought and bribed in Colorado; that your petitioner Lucius P. Marsh urged him, the said non-resident, to let him, the said Lucius P. Marsh, commence a certain suit then contemplated by the said non-resident in a state court, where he could bribe a judge who would do anything at all he, the said Lucius P. Marsh, wanted him, the said judge, to do; that, in and by the said bill of complaint, the said Thomas A. Green and the said Horace B. Johnson further allege that the said Lucius P. Marsh, a day or two thereafter, attempted to explain said matter to the said non-resident, and told him, the said non-resident, that he, the said Lucius P. Marsh, did not mean judges in Colorado outside of Denver, but that he, the said Lucius P. Marsh, meant judges in Denver, and meant the judge of the superior court of Denver, and that the said Lucius P. Marsh gave said non-resident to distinctly understand that he, the said Lucius P. Marsh, could bribe said judge of said superior court very cheaply, and had

done so in the said suit in said bill of complaint mentioned and described.”

The bill filed in the circuit court, which is made a part of the petition of the relators, seeks relief touching an alleged fraud perpetrated by Joslin and Lamb upon the complainants. This alleged fraud had already been the subject-matter of litigation in the superior court before Judge Rogers, who had rendered a decision therein in favor of the defendant Joslin. Anticipating that this judgment in the superior court would be pleaded as a former adjudication in bar of the action in the circuit court, the complainants seek to impeach it in their bill by allegations that it was obtained by bribery and fraud. The allegations of the bill upon this point are as follows:

“Your oratrix further shows to this honorable court that the only shadow or pretense of defense that said Joslin or said Lamb have to this suit is a certain fraudulent and corrupt judgment obtained by said Joslin against your oratrix in the superior court of the city of Denver, on or about the 7th day of April, 1886. That said action was commenced in said court by your oratrix against the said defendant, J. Jay Joslin, alone for damages for the breach of warranty in regard to the price and quality of said dry goods above mentioned, and was purely a technical legal action, as your oratrix is informed and believes, and not against the other defendants to this bill, and that said court had no jurisdiction to grant the relief sought in the suit. That when said action came on for trial, the whole matter of both law and fact was submitted to the judge of said court for trial, and no jury demanded by either party. That upon said trial your oratrix offered evidence to prove all of the facts substantially as alleged above in this bill in regard to the warranty of said goods, and that said Joslin could not successfully contradict or deny any of the substantial facts connected with said implied or expressed warranty as alleged above, but was compelled to admit, under oath, that he had put up said

goods himself from the old, faded, worthless goods of his said store in Denver, and had made out said false invoices, and had placed the prices on the same at the highest real price of said goods when the same were fresh and in fashion, and had secretly shipped said goods, after he had boxed up the same, to said public warehouse in the city of Denver, and had furnished said Lamb with said invoices and said goods to enable him to obtain your oratrix's property in the manner aforesaid; and, after said Joslin was compelled to admit, under oath, that the goods mentioned in said invoices were only worth thirty-three and one third per cent. of the said invoice prices, and that he had intentionally made out said false and fraudulent invoices, and put up and stored said goods in said public warehouse to accomplish the obtaining of the title to your oratrix's said large and valuable ranch and real estate, the same being situated, as aforesaid, only about six miles east of Denver, and well improved, and all under the Highline ditch, and that he had sold the same and realized \$14,000 in money for it, in addition to the \$6,000 incumbrances, and in all \$20,000 cash, or its full equivalent; and, after your oratrix had introduced in evidence the above written memorandum prepared by Joslin's own attorney, and wholly in his interest, and in which it is confessed in writing, and was so confessed and stated at the time they obtained said deed from your oratrix, and to induce your oratrix to execute and deliver said deed, that your oratrix was to have \$9,000 in money, and when it was agreed and understood by all that said dry goods were to be the same as money, and equivalent to \$9,000 in money; and notwithstanding all of these admissions, confessions and facts were fully presented to the judge of said court, and that Joslin admitted he had only delivered in all \$3,000 worth of goods to your oratrix, instead of \$9,000, and had wronged your oratrix, as above stated, out of \$6,000, that the judge of said court, to the utter astonishment of your oratrix and her

attorneys, and all persons present, except said Joslin and his attorneys, cut off the whole argument of the attorneys in said case except a brief opening, and, in an excited and frantic manner, more like a maniac than a cool, deliberate and impartial judge, declared that, in his view of said case, the same was an afterthought, and that no warranty or cause of action was made out against Joslin for breach of warranty, either express or implied, and that he would find for the defendant; and that the only reason and pitiful excuse offered by the said judge was that if there had been anything wrong about said transaction, that Mrs. Newton, your oratrix, would have rushed immediately to a lawyer and commenced a suit against said Lamb, who was shown to be wholly insolvent, or against said Lamb and his wife, to recover back said real estate, when it was shown by records and admitted that it was only eleven days from the day your oratrix deeded said property to Vira Lamb until she conveyed the same to Joslin, who was not then known in said transaction at all to your oratrix; and when it was admitted that your oratrix executed said deed late on a Saturday evening, and that said goods were not delivered to her until the first of the following week, and it was also shown in evidence that at that time your oratrix had a very sick child and a sick husband, and that during the very few days from the delivery of said goods until said Vira L. Lamb had conveyed said ranch to said Joslin, in pursuance of said conspiracy to defraud your oratrix out of the same, your oratrix only had time to make a hasty and imperfect examination of said goods, and take care of her sick family, and had no time to run to a lawyer to commence law-suits against parties who were wholly insolvent and worthless, or to commence a suit to recover back her property when she supposed it had passed into the hands of a *bona fide* purchaser in good faith, and was lost to your oratrix forever.

“ Your oratrix states, on information and belief, that

the statutes of limitation of this state give her three years in which to commence a suit for relief against said fraud instead of eleven days, and six years in which to commence action for breach of warranty; but that said false, absurd and pitiful excuse was the best reason said judge could give for rendering his said grossly unjust, oppressive and corrupt decision and judgment, as herein-after fully set forth. That said decision was so grossly unjust as to shock the moral sense of all present, except those who had corrupted said judge as hereinafter fully alleged and set forth. That during said trial, which lasted over two days, the said judge acted in a very strange, excited, frantic and partial manner, often growing pale, angry, and even frantic upon the bench towards your oratrix's attorneys when they were in the most quiet, polite and respectful manner presenting her case to said court; and when your oratrix was called to the witness stand, and said judge was administering the oath to her, she made an innocent mistake in thinking the oath was over, and let down her hand, whereupon said judge screamed at her in such an angry and threatening manner that your oratrix was rendered so nervous and so much confused that she was scarcely able to testify, and did not recover from the shock for several days thereafter; and your oratrix charges that said judge acted towards her in an insulting, cruel and brutal manner, for the purpose and with the intention of intimidating, confusing and bewildering her so she could not properly testify in her own behalf on said trial. That the conduct of said judge, during most of said trial, was more like that of a maniac than a calm, deliberate, honest and impartial judge of a court.

“Your oratrix states that upon the undisputed facts of said case, and upon the sworn statement of said Joslin himself, your oratrix was entitled to a judgment for \$8,000, with ten per cent. interest from the 15th day of November, 1883, and amounting in the aggregate to at

least \$7,500; and your oratrix further states on information and belief that said judgment rendered against your oratrix was so grossly and manifestly wrong and unjust, and so clearly against every principle of law and justice, as to shock the reason and moral sense of every fair-minded person and force the conclusion that the judge of said court was bribed or corrupted in some manner by said Joslin to render such a judgment against your oratrix. Your oratrix therefore charges, on information and belief, that said Joslin obtained said judgment against her by a combination of fraud, bribery, corruption, perjury and subornation of perjury, as hereinafter set forth, to wit:

“Your oratrix charges, on information and belief, that in addition to the grossly improper and partial conduct of said judge above alleged, that during said trial, and when said judge was sitting to try the same as a jury, that he was frequently found secretly and closely closeted with one Lucius P. Marsh, who was the leading attorney for said Joslin on said trial; and that one day during said trial said judge and said Marsh were closeted in the private chambers of said judge from the time said court adjourned at 12 o'clock until 2 o'clock P. M., when said court was again called, and that said judge was found on the most intimate relations with said Marsh throughout said whole trial; and that another time when said case was also on trial in said court, and said judge was unexpectedly absent and missed from said courthouse, when he was needed in court, the deputy sheriff was sent in search of said judge, and finally found him closeted with said Marsh in the law-office of said Marsh, in Lawrence street, in the city of Denver.

“Your oratrix states, on information and belief, that when jurors are called upon to try questions of fact in our courts, that they are always specially charged not to talk or converse with any persons in regard to such trial, and especially not to talk with any of the parties to such

suit, or with the attorneys of either side; and your oratrix charges, on information and belief, that for a juror to be thus caught closeted with one of the attorneys in an action while the same was on trial, and following an attorney engaged in such case to his office, and to be closely and secretly closeted with such attorney, that such conduct on the part of a juror would be so grossly improper, and so suspicious of corruption and bribery, that any verdict said juror might render in favor of the party represented by such attorney would be set aside at once; and your oratrix charges, on information and belief, that it is just as improper and as strongly suspicious conduct on the part of a judge to do so when sitting to try a case both as judge and jury; and your oratrix charges, on information and belief, that such grossly improper and suspicious conduct on the part of a judge is even much worse and much more suspicious than such conduct on the part of a juror.

“That the next day after said judge had rendered said unjust and corrupt judgment against your oratrix, a non-resident or citizen of another state, who was about to commence an important suit in the United States circuit court for the district of Colorado, and who had employed other attorneys to commence and conduct said suit in this honorable court, went to said Marsh to retain him to assist in said suit he was about to commence in this court, and to consult with said Marsh touching the matter, whereupon said Marsh told him that he had no idea how cheap judges could be bought and bribed in the state of Colorado, and not only advised him not to commence said suit in the United States circuit court for the district of this state, but urged him to let him (Marsh) commence his suit in a state court, where he could bribe a judge who would do anything at all he wanted him to do. That, when said non-resident informed his first attorneys of what Marsh had said, the said attorneys said any lawyer who would give bribes, or in any manner ad-

wise the giving of a bribe, was a scoundrel and a disgrace to his profession, and that they would not go into any case with such a man. That a day or two afterwards said Marsh attempted to explain said matter to said non-resident, and told him he did not mean judges in Colorado outside of Denver, but that he meant judges in Denver, and meant the judge of the superior court of Denver, and gave said non-resident distinctly to understand that he could bribe said judge of said superior court very cheaply, and had done so in your oratrix's said suit, and that he could corrupt said judge at any time with a very small sum of money to do anything he wanted him to do in any suit he might have before said judge, and that it would be a great advantage in such an important suit. Your oratrix states, on information and belief, that said Marsh referred said non-resident to your oratrix's case to show said non-resident what he could accomplish by the bribery of said judge of the said superior court to induce said non-resident to commence his suit in said court where said Marsh could bribe said judge for a very small sum of money to do whatever he wanted done, and to induce said non-resident to disregard the advice of his other attorneys to commence in the said United States circuit court. That said Marsh then and there substantially confessed to said non-resident that he has and could bribe said judge very cheaply. Your oratrix states all this on information and belief, but states that she has good and respectable witnesses to prove the same upon the hearing of this case; and she states, on information and belief, that she expects to be able to prove that said Marsh confessed that he had bribed said judge on the trial of her said action against Joslin.

"Your oratrix further states, on information and belief, that in all of his improper conduct with said judge of said court, that the said Marsh was acting as the attorney of said Joslin, and still is the attorney of record of said Joslin in said action, and by and with the con-

sent and approval of said Joslin, and that said Joslin is responsible for all the improper conduct of his said attorney in that behalf; and your oratrix further charges, on information and belief, that the statutes of Colorado make it a high criminal felony for any one to give any sum of money, directly or indirectly, or any other bribe, present or reward, or any promise, contract, obligation or security for the payment or delivery of *any money, present or reward, or any other thing, to obtain or procure the opinion, judgment or decree of any judge or justice of the peace acting within this state, or to corrupt, induce or influence such judge or justice of the peace to be more favorable to one side than the other in any suit, matter or cause pending or to be brought before him or them, and that both such person and such judge or justice of the peace is guilty of a felony under our statutes.* Sec. 102, R. S. 1883, p. 317.

“Your oratrix states, on information and belief, that the said long and secret interview between said judge and said Marsh while said action was being tried by said judge sitting as a jury, and the fact that said Joslin was a very wealthy man, and your oratrix very poor, was such grossly improper and suspicious conduct of itself on the part of both the judge and said Marsh, when followed by such a grossly unjust judgment, against every principle of law and confessed and admitted facts, and such strong evidence of bribery and corruption, that said judgment should be held to be wholly corrupt, fraudulent and void by this honorable court, and should not be interposed as a bar to this suit in behalf of said Joslin, or any of said defendants.

“Your oratrix states that she has been too poor to carry said judgment and action to the supreme court of this state in order to have the same reversed; that the stenographer and officers of said court demand about \$125 for a copy of the evidence and record in said action, and that the printing of the same will cost about as

much more; and that her husband is a hopeless, helpless and expensive invalid at present residing in the city of Chicago, and has nothing to support him except what your oratrix and some of his friends give him; and that your oratrix is a delicate woman, and has a large family of children to support, and has been robbed of everything herself and children had in the world by said Joslin and Lamb, as alleged in this complaint; and that your oratrix is wholly remediless and helpless, and doomed to a life of toil and poverty, unless this honorable court shall grant her relief; and therefore your oratrix comes into this honorable court, and in a plain, truthful, straightforward and candid manner lays before this honorable court the facts, circumstances and history of her wrongs, with an abiding faith that this honorable court will grant her all of her just and equitable rights, without regard to the wealth, standing, influence or official position of those who have so grossly wronged and robbed her, and where the cruel and remorseless influence of bribery and corruption cannot reach her."

The respondents in their answer, in substance, deny that they falsely, wickedly and maliciously made the charges contained in the bill filed by them in the circuit court, but assert that they drew and filed said bill containing said charges in good faith, and in an honest and faithful discharge of their duties as attorneys, and they reaffirm, under oath, on information and belief, that all of said charges therein contained are true. The answer further alleges: "Respondents, in further support of said charges in said bill, allege that at the April term, A. D. 1886, of the district court of said county of Arapahoe and state aforesaid, and at the suggestion of this honorable court, said bill in equity, and all the charges contained therein, were laid before the grand jury of said county, and that said grand jury spent almost an entire week in making an investigation of said charges, and found two joint indictments against the said J. Jay Jos-

lin and Edward F. Lamb mentioned in said bill, and upon the charges mentioned and fully set forth in said bill. * * * Respondents state, on information and belief, that said grand jury would also have found indictments against said Marsh and Rogers for the crime of bribery charged against them and the said Joslin in said bill in equity but for the wilful and corrupt perjury of one George W. Topping, a witness called in before said grand jury, as fully set out in the cross-charges herewith filed against said Rogers, Marsh *et al.*; and these respondents charge, on information and belief, that said Rogers and Marsh suborned the said Topping to swear wilfully and corruptly false before said grand jury in order to prevent said grand jury from finding indictments against said Rogers, Marsh and Joslin for the crime of bribery and corruption as charged in said bill in equity; and, as a matter showing probable and reasonable cause for making said charge of bribery and corruption in said bill in chancery, these respondents state, on information and belief, that notwithstanding said perjury on the part of said Topping, that all of said grand jurors were fully satisfied in their own minds that said Rogers, Marsh and Joslin were guilty of the crime of bribery and corruption as charged in said bill in equity, but were advised by the prosecuting attorney that there was not sufficient evidence, after said Topping had so perjured himself, to justify a conviction beyond all reasonable doubt in a criminal prosecution; and respondents further charge, on information and belief, that Ledru R. Rhodes, the prosecuting attorney of said county, was, by some means unknown to these respondents, corruptly induced and influenced by said Marsh, Rogers and Joslin to oppose the finding of all indictments against them by said grand jury. And respondents state, on information and belief, that said Rhodes did, in violation of his oath of office, and in gross violation of his duties of said office, use all the power and influence he could with said grand jury to

prevent them from finding any indictments, or making any unfavorable reports, against said Rogers, Marsh and Joslin, as fully set forth in the petition of Mrs. Newton herewith filed, and which these respondents ask may be considered a part of this answer."

On the 12th of November, 1886, Messrs. Green and Johnson, as attorneys for Mrs. Isabel J. Newton, filed in this court a petition of the said Mrs. Newton asking a rule against Judge Merrick A. Rogers and Lucius P. Marsh and Ledru R. Rhodes to show cause why they should not be disbarred. The petition charges, *inter alia* —

"That the said Merrick A. Rogers, the judge of said court, unmindful of the duties of his said office, and also of his office as attorney and counselor at law, and in violation of his oath of office, was guilty of wilful and corrupt conduct, as your relator is informed and believes, in this, to wit: Your relator charges, on information and belief, that said Rogers, acting in his said office as afore-said, in an action therein pending in his said court, wherein your relator, Isabel J. Newton, was plaintiff, and J. Jay Joslin was defendant, on or about the 20th day of April, A. D. 1886, and while said Rogers was trying said action, and sitting as both judge and jury, the said Rogers was guilty of the crime of bribery and corruption, as charged in the bill in equity filed in this procedure, and hereby referred to and made a part of these counter-charges; and your relator further charges, on information and belief, that the said Lucius P. Marsh, as the attorney of one J. Jay Joslin, bribed and corrupted the said Rogers, the judge of said court, to render a judgment in said action in favor of said J. Jay Joslin, as fully and specifically set forth in the said bill in equity; and your relator charges, on information and belief, that said Rogers acted, from a corrupt and partial motive, in favor of said Joslin, in rendering said judgment, and against every principle of law and justice, as charged in said bill in

equity, and which your relator states and charges, on information and belief, is true.

“Your relator further charges, on information and belief, that when said bill in equity was, at the suggestion of this honorable court, referred to the grand jury of the said county of Arapahoe and state of Colorado, at the April term thereof, and when said grand jury was engaged in the investigation of said charges contained in said bill in equity against said Rogers, Marsh and Joslin, and others, the said Rogers, Marsh and Joslin corruptly suborned a certain witness named George W. Topping, who was called before said grand jury, to wilfully and corruptly swear falsely and to perjure himself in order to prevent said grand jury from finding an indictment against Rogers, Marsh and Joslin for bribery and corruption, as charged in said bill in equity.

“Your relator further states, on information and belief, that said Ledru R. Rhodes, the prosecuting attorney as aforesaid, wholly unmindful of his duties as such prosecuting attorney, and in direct violation of his oath of office, and also of his office as attorney and counselor at law as well, colluded and conspired corruptly with said Rogers, Marsh and Joslin to use all of his power and influence, as such prosecuting attorney, to save and protect said Rogers, Marsh and Joslin from the consequences of a full, fair and impartial investigation of said charges contained in said bill in equity, and to obtain, if possible, what is generally called ‘a whitewashing’ by said grand jury for said Rogers, Marsh and Joslin, as your relator is informed and believes, and so charges on information and belief. * * * That the said Rhodes then and there, and in gross violation of his duties and oath of office, consulted, colluded and conspired with said Rogers, Marsh and Joslin, and their attorneys, touching the best manner to secure and protect the said Rogers, Marsh and Joslin against said crimes charged in said bill in equity, and consulted with said Rogers and said Marsh,

the attorney for said parties, as to the best means of protecting them from a prosecution for said crimes, and that said Rhodes consulted with said Rogers and Marsh, and with their said attorney, as your relator is informed and believes, with a view to trump up some false charge of some kind against T. A. Green and H. B. Johnson, your relator's attorneys, and said Rhodes was to use all of his power and influence, as said prosecuting attorney, to obtain an indictment against said Green and said Johnson. * * * And your relator charges, on information and belief, that said Rhodes made a corrupt promise or agreement, for some corrupt consideration unknown to your relator, whereby said Rhodes agreed with said Rogers, Marsh and Joslin that he would use all of his influence as such prosecuting attorney, and all the power and the great advantages he possessed as such prosecuting attorney, to prevent said grand jury from finding any indictments against any of said parties, and also from making any damning reports against any or either of said parties, and that in case said grand jury should find any indictment or indictments, or make or attempt to make any unfavorable reports, against said Rogers, Marsh or Joslin, that said Rhodes, as such prosecuting attorney, would, in the most secret manner and shortest possible time, suppress the same and at once dismiss any and all of such indictments, without allowing the same to become public or generally known, as your relator is informed and believes."

The petition further states that, in pursuance of said corrupt bargain, the said Rhodes did dismiss and enter a *nolle prosequi* in the case of the indictments against Joslin and Lamb.

These extracts show, in substance, the charges made in the petition for the disbarment of Rogers, Marsh and Rhodes. The answer of respondents denied each and every allegation of the petition. The two cases were consolidated, and heard by the court sitting as a trial court.

First case — Messrs. T. D. W. YONLEY, L. B. FRANCE and L. P. MARSH, for plaintiffs.

Messrs. THOMAS A. GREEN and H. B. JOHNSON, for respondents.

Second case — Mr. T. A. GREEN, for plaintiff.

Messrs. T. D. W. YONLEY and L. B. FRANCE, for respondents. L. P. MARSH, *pro se*. L. H. RHODES, *pro se*.

PER CURIAM. The relators in each of these proceedings seek to have the names of respondents stricken from the roll of attorneys admitted to practice before the courts of this state. The cases, although submitted together and upon the same evidence, will, so far as practicable, be separately discussed in this opinion.

1. The petition and answer in *People v. Rogers* present the following issues, viz.: Did Marsh proffer, and did Judge Rogers accept, a bribe in the *Newton Case*? Was the decision of Judge Rogers in said cause the result of a corrupt partiality on his part? Did Marsh and Judge Rogers, or either of them, induce Topping, by bribe or otherwise, to commit the crime of perjury before the grand jury? Did Marsh or Rogers, or either of them, tender a bribe to Rhodes, or otherwise corruptly endeavor to influence him in the discharge of his official duties with reference to the indictments in question? Did Rhodes accept this bribe, or a bribe from any person, to enter a *nolle prosequi* in connection with said indictments, or was he in any other manner corruptly influenced so to do?

It is not necessary for us to say that, if either of the respondents is guilty of the foregoing acts, he has disgraced the legal profession, and his license to practice should be promptly revoked. Such conduct, if tolerated, would soon bring the bench and the bar of the state into

disrepute, and confidence in a pure administration of justice would be effectually destroyed.

The offenses charged against Judge Rogers and Mr. Rhodes are acts committed in their official capacities as judge of the superior court of Denver and as district attorney of the second judicial district, respectively. Therefore they are grounds of impeachment under the constitution and statutes of this state. But both of these gentlemen have seen fit to waive legal objections, if any there be, against the present proceeding. They have appeared in response to the rule and filed an answer, putting in issue before us the truthfulness of the charges specified. They have, moreover, demanded a thorough and complete investigation by this court of their official conduct in the premises. We are not here called upon to review the decision of Judge Rogers in the case of *Newton v. Joslin*. Whether error supervened for which that judgment, upon a proper presentation, would be set aside, is a matter that is not and cannot be involved in the proceeding before us. This is not one of the methods provided for correcting the errors of inferior courts. Nor is the question whether or not the judgment in the *Newton Case* was obtained by the fraud or perjury of Joslin, his agents or witnesses, to be settled in this investigation. Neither can we now inquire whether the witness Topping committed the crime of perjury before the grand jury. It might be conceded, for the purposes of this case, that the judgment of Judge Rogers should be reversed for error, or that it should be treated in equity as wholly void because procured by fraud upon the court or by perjury; and it might also be assumed that Topping should be convicted of the latter crime. Yet these circumstances would not necessarily, in and of themselves, have any bearing upon the case now under consideration.

Impressed with the supreme importance of the questions presented, we devoted nearly a week to hearing the evidence and arguments of counsel in the two cases at bar.

All evidence offered to sustain the foregoing charges was admitted. A great deal of testimony which might, under a strict application of technical rules of evidence, have been excluded, was received. Petitioner and her attorneys were given a most unlimited discretion in the production of documents and witnesses to support the several matters averred by the petition. Since the trial we have most patiently and industriously weighed the proofs in all their bearings, and our conclusions are the result of a deliberate and careful consideration thereof. No useful end would be subserved by a discussion or analysis here of the evidence in detail. Besides, such analysis takes place, of necessity, in determining the case against Messrs. Green and Johnson. We are glad to say that, so far as this branch of the case is concerned, the good name of the judiciary and bar of the state remains untarnished. It is with profound satisfaction that we find ourselves compelled to declare each and every of the foregoing charges unsustained. We discover nothing which justifies a finding that either of respondents, in the transactions mentioned, committed a dishonest act, or entertained a corrupt motive. Their conduct was not inconsistent with a conscientious endeavor to honorably perform their official duties.

The rule in this case must be discharged.

2. It remains for us to consider the pleadings and evidence in the case against Messrs. Green and Johnson.

A bill filed in the circuit court of the United States by the respondents, as attorneys for Mrs. Newton, is made the basis of the petition for their disbarment. By reference to the pleadings set forth in the statement of facts preceding this opinion, it will be seen that the bill complained of charges, in substance, that Marsh gave, and Judge Rogers received, a bribe in the case of *Newton v. Joslin*, already referred to; also that Marsh told one Topping that he could bribe the judge of the superior court of the city of Denver, and had done so in said case. It

will be noticed also, by reference to the answer of respondents, that they admit the filing of the bill, but claim that in so doing they acted in good faith, and without malice, as the attorneys for Mrs. Newton. They also reassert the charges made in their bill against Marsh and Rogers, and aver their ability to prove them. It will be further seen, by reference to their answer, that respondents therein allege a new and distinct felony, namely, that when these charges of bribery and corruption were, at the suggestion of this court, brought to the attention of the grand jury, the said Marsh and Rogers were guilty of subornation of perjury, in that, with a view to their exculpation, they suborned one Topping to testify falsely before said body, and they further allege a conspiracy between Marsh, Rogers and the prosecuting attorney to defeat the investigation before the grand jury. These charges were so grave, were accompanied with such emphatic averments of ability to prove them, touched so closely the most vital interests of the public, that, as already suggested, we felt it our duty to depart from our general practice, and hear the entire case in open court, giving respondents the widest latitude in the introduction of testimony. Although we could not, on this proceeding, in any legal sense, review the trial in the superior court of the case of *Newton v. Joslin*, wherein Judge Rogers is alleged to have been bribed by Marsh, we nevertheless admitted all the pleadings and evidence in that case for the purpose of examining their bearing upon this case, but chiefly as affecting the motive of respondents in preparing and filing the bill in the federal court.

As we have seen, the respondents interpose two defenses: *First*, that the charges made in the bill complained of are true; *second*, that the pleading is privileged.

We have already considered these charges in connection with the petition of the respondents for the disbarment of Rogers and Marsh. No satisfactory evidence

has been presented to us showing that they are true. Before commenting further on the evidence we pass to the consideration of the second defense.

In actions for libel and slander, the English rule appears to be that judges, counsel, parties and witnesses are absolutely exempted from liability to an action for defamatory words published in the course of judicial proceedings. The American courts, we think, as a rule, accept this doctrine, with the qualification, as to parties, counsel and witnesses, that their statements made in the course of an action *must be pertinent and material to the case*. This modification of the English rule is adopted in this country in order that the protection given to individuals in the interest of an efficient administration of justice may not be abused as a cloak from beneath which to gratify private malice. *McLaughlin v. Cowley*, 127 Mass. 319. Subject to this restriction, it is thought, on the whole, for the public interests, and best calculated to subserve the purposes of justice, to allow counsel full freedom of speech in conducting causes, and advocating and sustaining the rights of their constituents. *Hoar v. Wood*, 3 Metc. 198. The foregoing is the rule in actions of libel and slander. This is a disbarment proceeding, and we apprehend that the question presented is different, and must be determined upon different considerations.

"An attorney is liable to be removed from office by the court for sufficient reason and on proper showing. This reason and this showing are not necessarily limited to criminal offenses, or to an act which would create a civil liability. In the case of an attorney of the court, he may be removed from his office of attorney absolutely or for a limited period of time, or, in the common phrase, may be suspended or disbarred, for any matter or thing proved against him which shows that he is unfit to be permitted to practice in the court as one of its officers."
"This unfitness may be shown by his guilt of a crime,

as theft, murder, burglary. It may also be shown by proof of such bad moral character as is inconsistent with such an honorable office. It may be shown by specific acts done in connection with his business in the court, or out of it, if it be in the practice of the duties of an attorney, which may show him unfit to be trusted as such, but which are short of any criminal offense." *Ex parte Cole*, 1 McCrary, 407; *Penobscot Co. Bar v. Kimball*, 64 Me. 153.

The powers, duties and privileges of an attorney are conceded. No question is made concerning them. The point made is that he is unfit to exercise and enjoy them. In an action for libel or slander for defamatory words, published or spoken, in the course of a judicial proceeding, it may be conceded that he may plead his privilege, and his plea must be allowed if the matter be pertinent and material to the issue. He enjoys this privilege by virtue of his license as an attorney. The gist of the complaint in this proceeding is that the respondents have abused this privilege, and that they are unfit persons to hold the license of this court, and to exercise and enjoy the rights and privileges which it confers. The petitioners in this case do not claim that respondents can be made to respond in damages in an action for libel or slander, but they come to this court, and allege most flagrant misconduct, and ask us to protect them and the public by withdrawing from the respondents, as unfit persons, our license authorizing them to practice as attorneys. We think there is an undoubted inherent right and power in this court to inquire into the abuse mentioned, and, if it be proven that the charges alleged in the bill referred to were made with malice and without probable cause, to disbar the respondents therefor. Our former opinion assumed and proceeded upon this theory, although we did not then discuss our *right* to enter upon such an inquiry. To say that a court which licenses an attorney cannot inquire into an abuse of its license is to

establish a class absolved from the demands of justice and privileged to do injury — *legibus soluti*. The argument that an attorney cannot be proceeded against civilly or criminally only demonstrates the greater necessity for the possession and exercise of the power to suspend or disbar. It is true that the pleading complained of was filed in a federal court, but the attack was upon a state court by an attorney holding a license of the state, and of such a character as to bring into disrepute, and to destroy public confidence in, the administration of justice by a state tribunal. Whether made in a federal court or in a state court, such charges, made maliciously and without probable cause, show the attorney making them unfit to enjoy the rights and privileges of an attorney. Aside from this, as we shall hereafter notice, the answer of the respondents, and Green's separate petition for the disbarment of Rogers, Marsh and Rhodes, afford distinct and independent grounds for disbarment *sua sponte*. That this power of disbarment is to be exercised guardedly, with full reference to the importance of freedom of speech in conducting causes and in advocating and sustaining rights, is matter of course.

With the foregoing propositions in view, we proceed to an examination of the facts in this cause, and the claim of respondents that they acted in good faith and upon probable cause.

We are cited by respondents to the character of the decision rendered by Judge Rogers in the superior court in the case of *Newton v. Joslin* as a sufficient ground to justify both the belief and charge of bribery. It may be conceded, for the purposes of this case, that Judge Rogers erred in his decision in that case, and that Mrs. Newton thereby suffered injustice. These facts alone would not constitute ground for charging the judge with having acted corruptly in the premises. It would be indefensible to say that, because a judge commits error of law or of fact, he is therefore corrupt, and that attorneys

aggrieved by the decision may, without other evidence, denounce him upon public records as a taker of bribes. The claim, however, of the respondents is that the decision complained of was so monstrous in its character as to shock the moral sense, and, taken in connection with other circumstances given in evidence, such as to justify both the belief and charge of bribery. However erroneous the decision complained of may have been, we do not think that it can be fairly or justly, on the pleadings and on the evidence, characterized as a monstrous judgment. There was much conflict of testimony; there was evidently perjury upon one side or the other; and much would depend upon the ability of the judge to determine the credibility of witnesses. Much stress is laid upon the allegation that Joslin, on the trial of the cause before Judge Rogers, *confessed* the fraud. While the testimony of Joslin may not free him from suspicion, it is not correct to say that upon the trial he confessed the fraud.

In addition to this alleged wrong and unjust judgment, the respondents aver and attempt to prove circumstances which to them strongly corroborated their theory of bribery. They allege that, during the trial of the cause, the said judge and the said Marsh were frequently "secretly closeted together" at the judge's chambers, and at the office of the said Marsh. Upon this point the evidence shows that Marsh, during a noon intermission of the court, while the trial of the case was in progress, was upon one occasion seen sitting in the judge's chambers talking with the judge. No evidence was offered to show what the conversation was between the parties, or that it was not perfectly proper. On the other hand the testimony of Marsh and Rogers is that, if they were together at said time and place, the meeting resulted from a casual call of the former upon the latter, while waiting for the incoming of the court, and that, if any conversation occurred, it had no relation whatever to the

case on trial. The judge's room was part of the sheriff's office, divided by a partition reaching part way to the ceiling. The door of this room and the one communicating with the sheriff's office and hall were, at the time, both open. The employees and deputies in and about the court and the sheriff's office were coming and going.

The respondents also proved that, upon one occasion during the progress of the trial, Judge Rogers was found coming out of Marsh's office. But the evidence shows that, prior to leaving the court-room, the judge had told the deputy sheriff that he (Judge Rogers) would call on his way to dinner at the office of Marsh and at the office of respondent Green, and notify them, as the attorneys in the case, to be present at the incoming of the court to receive the jury. The testimony further shows that, in pursuance of this declared intention, the judge did call at the said Marsh's office and so notified him; that he did not remain in the office; that he did not even take a seat; that he merely stepped within the door, and, having notified Marsh, turned to leave the office, when he met the bailiff sent for him by the deputy sheriff. While it must be remembered that the respondents, at the time they filed their bill, had no knowledge of these explanatory facts, the naked facts themselves, as they saw them, by no means justified the offensive, and, in the connection in which it was used, crime-imputing, allegation that the judge and Marsh were frequently found, during the pendency of said suit, "secretly closeted together." Such intercourse is common between judges and attorneys, and is no evidence, to a fair and candid mind, of bribe-giving and bribe-taking. Delicacy and prudence may suggest, upon a given occasion, to both attorney and judge, a limitation, if not a suspension, for the time being, of social intercourse; but the subject must be left to these guides. The proposition that attorneys and judges shall cease to call and converse because of pending litigation cannot be admitted. That no reputable

attorney would take advantage of social intercourse to approach a judge concerning litigation pending before him, and that no upright judge would permit of such an approach, is well understood by the profession. The only result of the rule contended for by respondents would be to inhibit social amenities between judges and members of the profession. It would not prevent a corrupt attorney and a corrupt judge from negotiating.

The respondent Johnson, in his testimony, tells us that upon the next day, or soon after the trial of the case of *Newton v. Joslin*, he met Marsh, and that, in the course of a conversation about the trial, the latter said to him: "It is better for attorneys to submit when they are beaten," or words to that effect. We confess to some surprise that we are cited to this as a circumstance worthy of consideration in connection with the charge that Marsh had bribed the judge, and do not deem it necessary to notice it further.

We come now to consider the alleged declarations of Marsh that he could bribe the judge of the superior court, and that he had bribed him in the case of *Newton v. Joslin*. These declarations, respondent Green testifies, were communicated to him by Topping. It may be questioned, if the declarations of Marsh were proven as alleged, they would be admissible as evidence against Rogers. Marsh denies under oath that he ever made any such declarations to Topping. Topping testifies to the same effect, and further denies, *in toto*, that he ever informed respondent Green that Marsh had made any such declarations. The respondent Johnson, upon this point, derived his information from Green, and does not claim that he ever had any conversation with Topping upon the subject. Let it be conceded that Topping made these statements to Green and also to the witness Robinson, and that Green, and not Topping, speaks the truth in this particular. The respondents do not appear to have taken any steps, or to have made any inquiry, to verify

the statement of Topping, although he was a non-resident and a comparative stranger to them, and although, according to their own testimony, he was a person willing to bribe a judge. We are unwilling to say that the unsworn statement of a comparative stranger, about whose integrity, veracity and standing the respondents knew nothing, constituted "probable cause" for believing, charging and publishing upon official records that a brother attorney and the judge of an important court were guilty of an infamous crime.

When our attention, at the last term, was first called to the charges made by respondents against Marsh and Rogers, we directed that the whole matter be laid before the grand jury as a proper subject for their investigation. Such an investigation was had; and, while the grand jury found an indictment against Lamb and Joslin, they failed to find any bill against Marsh or Rogers. On the other hand, it appears in evidence that, while they thought that Judge Rogers erred in his judgment, they made a report to the district court entirely exonerating him from the charges of bribery and corruption. Thereafter the respondents came into this court, and by their sworn answer in this case, and Green by the petition for disbarment against Rogers, Marsh and Rhodes, advise and inform us of this investigation, and do not hesitate to charge subornation of perjury by Marsh and Rogers, perjury upon the part of the witness Topping, corruption upon the part of the prosecuting attorney by bribe-taking or otherwise, conspiracy between Marsh, Rogers and the prosecuting attorney to defeat the investigation, and a purpose to "whitewash" upon the part of the sworn members of the grand jury. Of these wholesale charges of bribery and corruption, of subornation of perjury, and conspiracy before the grand jury, we invited proof. The respondents have offered us substantially nothing. It is true that Rhodes entered a *nolle prosequi* as to the indictments against Joslin and Lamb, but this appears to have

been with the consent of the court, in open court. There is no evidence that Marsh and Rogers ever had any conference or conversation or communication whatever with Rhodes touching the investigation before the grand jury. On the other hand, all of these parties testify without equivocation that not a word, written or spoken, passed between them upon the subject of the investigation, except the written communication of Judge Rogers asking the prosecuting attorney, in accordance with the suggestion of this court, to lay the charges made by Green and Johnson before the grand jury. The respondent Green testifies that some of these things charged were told him on the street; and this, taken in connection with the *nolle prosequi* entered by Rhodes, and other circumstances not of sufficient importance to enumerate, is regarded by him as sufficient to justify these charges of felonies, deliberately made in written pleadings in this court. We notice these new and distinct charges of felonies in the answer and the petition against Rogers and Marsh, and the evidence in support of them, as matter pertinent to the motive of respondents in this entire proceeding; as illustrating how grave the charges, and how insufficient the proof in support of them, and as constituting in and of themselves an abuse of the confidence of this court, which justifies the disbarment of at least one of the respondents, *sua sponte*.

The foregoing is a brief statement of the evidence upon which respondents claim to have acted. Whether the averment in respect to the declarations of Marsh and Topping that he (Marsh) could bribe Judge Rogers, and did bribe him in the *Newton Case*, was material, we do not consider. We determine the issues as though this allegation were not questioned as immaterial.

We appreciate all that can be properly said touching the independence of the bar. We recognize fully the importance of such independence to all good government, and its value as a means of securing the fair, impartial and pure

administration of the laws. We have no desire to abridge it, and upon all proper occasions will take care that it shall find full protection and vindication in the decisions of this court. But under no considerations applicable can we find justification for the conduct of respondents in the matters before us. We have declared that the charges made in the bill, the petition and the answer are wholly unsustained by the evidence. They therefore must be regarded as false. The language employed by bill, petition and answer, in connection with the charges, is of such a character to produce a strong impression that its author, Green, must have been actuated by malice. This impression is strengthened into conviction by the slender foundation upon which the charges are shown to have rested. Respondent Green, in our judgment, considering the facts proven, singly or together, cannot be said to have acted upon probable cause. These charges were made upon such slight information, governed apparently by such unfounded suspicions, and with such reckless disregard of injury to professional and judicial character, that the inference of malice, at least with regard to him, becomes irresistible. Neither the letter nor the spirit of the attorney's privilege permits him to enter our courts and spread upon judicial records charges of a shocking and felonious character against brother attorneys, and against judges engaged in the administration of justice, upon mere rumors, coupled with facts which should, of themselves, create no suspicion of official corruption in a just and fair mind. And although, in actions of libel and slander, it has been thought wise to exempt them from liability for defamatory words, published or spoken, in the course of judicial proceedings, provided such words are material, in a disbarment proceeding the recognition of such a privilege could neither secure justice nor advance the independence of the bar. On the contrary, its inevitable tendency would be to destroy the respect due to the profession as well as

to the bench, and cripple the influence and usefulness of both. Upon a careful review of the evidence, therefore, we are forced to the conclusion that the conduct of respondent Green in the premises was prompted by malice, and was without probable cause.

As to whether respondent Johnson acted with malice in connection with the bill filed in the federal court, the evidence is not so satisfactory. Differences appear in the grounds upon which the conduct of the two respondents is predicated. Green was the senior counsel, and Johnson was called in by him as assistant. Johnson had nothing to do with planning or preparing the bill referred to. When he was called into the case, this bill had been drawn by Green and had been signed and verified by Mrs. Newton. Topping had been favorably introduced to Johnson by a gentleman in whom the latter had confidence. Johnson relied upon the reports given by Green and Robinson of Topping's assertions relating to the bribery of Judge Rogers in the *Newton Case*. Topping had never employed Johnson; he was a client of Green. Johnson depended upon Green's statements as coming from a brother attorney. The evidence clearly shows that previous to and during the trial of the *Newton Case* the strongest ill-will existed between Green and Marsh. On the other hand, the relations of Johnson and Marsh and of Johnson and Rogers were perfectly friendly. Johnson would therefore be less likely to act with malice towards one of these defendants in filing said bill. The petition for disbarment in *People v. Rogers*, submitted and tried with this case, was prepared by Green. Johnson had no knowledge of its contents until the same had been filed. Upon learning that this independent proceeding had been instituted and his name connected therewith as attorney, he withdrew entirely from that case and declined to have anything to do with the prosecution thereof. It is a fact of which, in determining the degree of punishment, this court may properly take judicial

notice that the name of Green has once before been stricken from its roll for misconduct in office; such misconduct being a malicious verbal assault upon the judge of a district court for rulings in a case before said judge wherein Green was of counsel (*People v. Green*, 7 Colo. 237), while, on the other hand, respondent Johnson has hitherto, so far as we are informed, always conducted himself in accordance with the highest demands of professional dignity and courtesy. Under these circumstances, we are not prepared to say that Johnson's conduct in filing the bill in the federal court was not the result of undue zeal for the welfare of his client, rather than of malice towards Judge Rogers or either of the other defendants. We cannot, however, view his action in the premises as blameless. We think he proceeded without that caution and circumspection which the gravity of the charges demanded; and that his conduct, especially in connection with the answer filed in this court, is highly censurable. Before signing his name to the bill or to the answer he should have made a much more careful and thorough investigation as to the truthfulness of their averments. But while we cannot excuse his conduct in the premises, we have concluded to vacate the judgment of disbarment hitherto pronounced. We think the suspension from practice which has already taken place, and its continuance until the April term of this court, a sufficient punishment. The judgment of disbarment is accordingly revoked, and his name is restored to the roll of attorneys. He will, however, remain suspended from practice until the first day of the April term aforesaid. The judgment of disbarment pronounced against respondent Green will remain undisturbed.

The opinion heretofore filed is withdrawn, and the foregoing will be substituted in lieu thereof as the opinion of the court.

MACK V. JACKSON ET AL.

1. In an action on an injunction bond to recover damages for loss of plaintiff's crops by reason of his being restrained from using the water in a certain ditch, the evidence showed that there was a great scarcity of water, and that it could not have reached plaintiff's land, whereupon a verdict for nominal damages was rendered. *Held*, that such verdict would not be disturbed.
2. Where a party sues for damages caused by being restrained from using the water from a certain ditch, if it is shown that he could have obtained sufficient water from another source, he will not be entitled to receive a greater sum than he would have had to expend to obtain water from such source.

Error to District Court of El Paso County.

THIS is an action brought by Mack against Jackson and others on an injunction bond. The injunction was issued at the suit of Jackson against Mack, restraining him from the use of water in a certain irrigating ditch described in the bond "as the first head of the Moore ditch." The injunction was subsequently dissolved, and the plaintiff, by this suit, seeks to recover damages for the loss of his crops by reason of the issuing of the injunction. The case was tried to a jury, and the verdict was for the defendant. The court, notwithstanding the verdict, with the consent of the defendant, gave judgment for the plaintiff for one dollar nominal damages. The plaintiff brings the case to this court by writ of error.

Mr. JOHN B. COCHRANE, for plaintiff in error.

Mr. J. L. WILLIAMS, for defendants in error.

ELBERT, J. The uncontradicted testimony of all the witnesses who testify upon the subject is to the effect that there was a great scarcity of water in the Fountain, the stream from which the ditch in question was taken; that, while there was some supply of water at what are called the "lower" and "middle heads" of the ditch, at the "first head," to which the injunction alone applied,

the scarcity of water was such that the plaintiff could not have irrigated his land therefrom had the injunction never issued; that there was but little or no water obtainable through this first head; that the distance to the plaintiff's land was about two miles; and that there was not enough water in the ditch to reach his land. The plaintiff made no effort to controvert these facts. In view of this evidence, we see no reason for disturbing the verdict of the jury. The court, notwithstanding the verdict, entered judgment in favor of the plaintiff for *nominal damages*, with the consent of the defendant. This obviates the objection that the court refused to instruct the jury that the plaintiff was entitled to recover nominal damages. The instruction, however, which the plaintiff claims to have asked in this behalf, is so blind as to leave its meaning in doubt, and was properly rejected.

The following instruction is objected to: "In passing upon the question of damages, and in considering the evidence, you may consider whether or not the plaintiff might have obtained water through another ditch readily and at slight expense; and if he could have obtained sufficient water through some other source to have prevented the injury, he is not entitled, it seems to me, to recover a greater sum than it would, under the evidence, have reasonably required for him to have expended in procuring the water from such other source, thereby preventing the injury complained of in this case." This instruction was pertinent to certain evidence, to the effect that the plaintiff could have secured water for his crops at points on the stream lower down, nearer his ranch, through the middle and lower heads of the ditch, the use of which the injunction did not forbid. It is a rule that one cannot recover for an injury which he might by reasonable precautions or exertions have avoided. Sedg. Dam. 105.

The judgment of the court below is affirmed.

Affirmed.

DRUMMOND ET AL. V. LONG ET AL.

9	538
b15a	153
15a	154
9	538
f19a	339
9	538
f38	489

1. The federal and state laws are substantially the same in requiring that a recorded certificate of location of a mining claim must, among other things, contain such a description as shall identify the claim with reasonable certainty.
2. The intention of the statutes is to give one seeking the *locus* of a recorded claim something in the nature of an initial point from which to start. The identification must be by reference to some natural object or permanent monument.

Error to District Court of Ouray County.

ROBERT LONG, deceased, the original defendant below, made application at the proper land office for a patent to the Portland lode. James A. Drummond and others, plaintiffs below, owners of the Amphitheatre and Mountain Bell lodes, filed an adverse claim, and brought this suit in pursuance thereof. The Portland lode was located in 1875. The Amphitheatre and Mountain Bell lodes were located in 1878, and embrace within their boundaries certain of the territory included in the Portland location. Upon the trial the defendant introduced in evidence the following certificate of location:

"Know all men by these presents, that we, R. F. Long and M. V. Cutler, of the county of La Plata and territory of Colorado, claim, by right of discovery and location, one thousand five hundred feet, linear and horizontal measurement, on the Portland lode, along the vein thereof, with all its dips, variations and angles, together with one hundred and fifty feet in width on each side of the middle of said vein at the surface, and all veins, lodes, ledges and surface ground within the lines of said claim; one thousand and fifty feet on said lode running southeast from the center of discovery shaft, and four hundred and fifty feet running northwest from center of discovery shaft, said discovery shaft being situate upon said lode, within the lines of said claim, in Uncompahgre mining district, county of La Plata, territory of Colorado,

on the southwest side of Mount Hardin, in Portland gulch, about one thousand five hundred feet north of the Hawk Eye lode. Said Portland lode was located on the 30th day of August, 1875. Date of certificate, October 4, 1875.

[Signed]

“R. F. LONG,

“M. V. CUTLER.”

The jury found for the defendant. Writ of error to the supreme court.

Mr. L. B. WHEAT, for plaintiffs in error.

Messrs. MARKHAM, PATTERSON and THOMAS, for defendants in error.

ELBERT, J. The certificate of location of the Portland lode was admitted in evidence on the trial in the court below, over the objection of the plaintiffs that it did not comply with the requirements of section 2324 of the Revised Statutes of the United States, in that it did not contain such a description of the claim located, by reference to some “natural object or permanent monument,” as would identify it. Section 2399, Gen. St. 722, provides that the discoverer of the lode shall record his claim in the office of the recorder of the county, and section 2400 requires that the certificate of location thus recorded shall contain, among other things, such a description as shall identify the claim with reasonable certainty. In this respect the requirement of the federal and state law may be said to be substantially the same. That degree of certainty with which the final survey for a patent fixes the *locus* and boundaries of the subject-matter of the grant is not required in the original location to be made by the discoverer of the lode, nor would it be practicable without the aid of a professional surveyor. While this is true, fixing the *locus* of the ground sought to be appropriated, in the first instance, with reasonable certainty, by reference to natural or artificial monuments, is practicable, and is of the first importance to prevent

frauds and mistakes. The government should be able to identify the premises originally located as the premises sought to be patented. Other parties dealing with and seeking to appropriate neighboring territory should be able to identify the claim located, to the end that they may proceed with their own locations, without the danger of intruding upon others, or of having the locations of others swung or shifted upon their own. Mining litigation under the acts of congress discloses frequent attempts to secure a patent for mining territory other than the territory originally located, in fraud of the government and in fraud of the rights of neighboring locators. The foregoing are some of the considerations upon which the statutory requirement we are considering is based.

The intention of the provision is to give one seeking the *locus* of a recorded claim something in the nature of an initial point from which to start, and, following the course or distance given, find with *reasonable certainty* the claim located. The identification must be by reference to some natural object or permanent monument. Stone monuments, blazed trees, the confluence of streams, the point of intersection of well-known gulches, ravines or roads, prominent buttes, hills, mining shafts, etc., are enumerated as satisfying the requirements of the law. The permanent monuments of a neighboring mining claim are also regarded as sufficient. *Wade*, Min. Law, 113; *Quimby v. Boyd*, 8 Colo. 200; 6 Pac. Rep. 462; *Gilpin Co. Min. Co. v. Drake*, 8 Colo. 590; 9 Pac. Rep. 787; *North Noon Day M. Co. v. Orient M. Co.* 6 Sawy. 300; 1 Fed. Rep. 522; *Jupiter Min. Co. v. Bodie Con. M. Co.* 7 Sawy. 96; 11 Fed. Rep. 666.

In the certificate before us we do not find any such reference to either a natural object or a permanent monument as meets the substantial requirements of the statute. Describing the lode as being on the southwest side of Mount Hardin, and in Portland gulch, locates the lode generally. It is not, however, that definite location, by ref-

erence, which the statute contemplates. *Faxon v. Barnard*, 1 Colo. Law Rep. 147. The certificate also describes the discovery shaft of the Portland as being about one thousand five hundred feet north of the Hawk Eye lode. The evidence discloses nothing respecting the character of the Hawk Eye lode. We assume, however, that it has been duly located in compliance with the laws of congress and of the state; that it is in the usual form of a parallelogram, one thousand five hundred feet in length by three hundred feet in width; and that it contains about ten acres. A tract of land of such dimensions cannot be treated either as a natural object or permanent monument, within the meaning of the act of congress. The discovery shaft of the Portland is not tied definitely to any corner or monument of either the location or lode. From what point on the Hawk Eye location or lode is one to start to find and identify the discovery shaft of the Portland? With the starting point anywhere in a parallelogram of ten acres, the discovery shaft is anywhere about one thousand five hundred feet distant in ten acres to the north. To say that the lode and not the location is meant aids but little the indefinite character of the reference. Under such conditions, identification with that reasonable certainty required by the statute is an impossibility, and it cannot be said that the statute, in this respect, has been complied with. To hold otherwise would leave the requirement of but little practical utility. The insufficiency of the location certificate in this respect is apparent upon its face, and we do not see that it can be aided by evidence *aliunde*. The effect of the omission is to leave the certificate of location void. *Gilpin Co. Min. Co. v. Drake*, 8 Colo. 586; *Faxon v. Barnard*, 1 Colo. Law Rep. 147.

In this view, the court below erred in admitting the certificate of location of the Portland lode in evidence, and its judgment must be reversed. The judgment of the court below is reversed and the case remanded.

Reversed.

BOARD OF COUNTY COM'RS OF BOULDER CO. V. KING.

1. Where an appeal is taken by the board of county commissioners in an action against them, the appeal bond must be executed in the name of the board, and not by the members individually.
2. On appeal from a county court to a district court where the bond is insufficient, and the courts grant time to file an additional bond, if the new bond is adjudged insufficient, whether the appellant shall have further time to file a third bond rests in the sound discretion of the court, and on appeal such discretion will not be interfered with, except upon substantial and apparent grounds of abuse.

Error to District Court of Lake County.

THIS action was brought by King against the "board of county commissioners of the county of Boulder," in the county court of Lake county, where he obtained judgment. From this judgment the defendant, the plaintiff in error, appealed to the district court. This appeal was dismissed for reason of the failure of the plaintiff in error to file a sufficient appeal bond, in compliance with the order of the court. The further facts in the case sufficiently appear in the opinion of the court.

Messrs. J. M. MAXWELL and R. H. WHITELEY, for plaintiff in error.

Messrs. D. E. PARKS and COE and SALES, for defendant in error.

ELBERT, J. Upon the motion of appellee in the district court to dismiss the appeal from the county court for the want of a sufficient appeal bond, the court ordered "that said motion be sustained unless said defendant files herein an additional appeal bond in the sum of \$1,200, with sureties, to be approved by the clerk of this court, within thirty days from date." The bond filed by the appellant in pursuance of this order was objectionable in several particulars.

"The board of county commissioners of Boulder

county" was the defendant in the county court, and was the appellant in the district court. The amended appeal bond required should have been executed in the name of "the board of county commissioners of Boulder county." The filing of a bond executed by individual members of the board, designating themselves as commissioners, was not a compliance with the order of the court. Section 523, Gen. St., provides that the powers of the county as a body politic and corporate shall be exercised by a board of county commissioners therefor, and section 525 provides that, in all suits or proceedings by or against a county, the name in which the county shall sue or be sued shall be "the board of county commissioners of the county of ———."

It is insisted, however, that where the purpose to act for the corporation is manifest from the whole paper, and where there are no words evincing an intention to assume a personal liability, the corporation will be liable. While this may be true (1 Dill. Mun. Corp. § 452, and cases cited), it does not meet the objection to the bond. "Whether the purpose to act for the corporation is manifest from the whole paper" is frequently a question of difficulty. The court which is to approve the bond may well object to considering and determining the questions such a bond presents. The appellee, for whose security the bond is given, may well object to the unnecessary presence in the bond of a question which clouds his security, and casts on him the burden of maintaining that which should be beyond question. He had a right to insist, under the statute and under the order of the court, that the bond be executed in the name of the party to the suit,—the party taking the appeal. We think there was no error in the refusal of the court to treat the amended appeal bond in this case as sufficient.

On appeal from the county courts to district courts, where the appeal bond is defective or informal, it becomes the *duty* of the court to fix a reasonable time

within which the party appealing shall file a good and sufficient bond. Sec. 500, Gen. St. 246; *Wheeler v. Kuhns, ante*, p. 196. If the new bond shall be in turn adjudged insufficient, whether the appellant shall have further time within which to file still another bond rests in the sound discretion of the court. This is the view taken of a substantially similar provision respecting defective or informal appeal bonds on appeals from justices of the peace under section 1986 of the General Statutes. *McKee v. Bassick Min. Co.* 8 Colo. 394. With the discretion of the *nisi prius* court, exercised in such a case, we do not feel at liberty to interfere, except upon substantial and apparent grounds of abuse, which do not appear in the record in this case.

It is unnecessary to consider the other objections urged to the appeal bond in this case. The judgment of the court below is affirmed.

Affirmed.

9 544
9 550

G., B. & L. R'Y Co. ET AL. v. EAGLES.

1. Legal possession by a railroad company of the right of way over land, and authority to construct and operate its railroad thereon, do not authorize or sanction a direct intrusion and trespass upon adjacent private property.
2. In general if a voluntary act, lawful in itself, may naturally result in the injury of another, or the violation of his legal rights, the actor must at his peril see to it that such injury or such violation does not follow or he must expect to respond in damages therefor; and this is true regardless of the motive or the degree of care with which the act is performed.
3. But such injury must be the proximate consequence of the act complained of. And if there be no intermediate efficient cause the act must be considered as reaching to the effect.

Appeal from County Court of Clear Creek County.

THE appellant company, having procured the right of way for its railroad through Georgetown, proceeded to

excavate for its road-bed. In so doing, the removal of rock by blasting became necessary. While its employees were thus engaged, large pieces of rock and other *debris* were hurled into the air, falling at considerable distances, and upon the premises of private parties, including plaintiff, living in the vicinity. Pieces of the rock thus thrown fell upon the roofs of two of plaintiff's buildings, badly breaking them, and doing considerable damage. Besides this, plaintiff avers, and supports the averment with proof, that, by reason of the danger from falling missiles, tenants vacated his premises, other persons refused to lease, the buildings remained vacant, and he was seriously injured by the loss of his usual rentals. To recover for these alleged damages, plaintiff brought this action. The jury returned a verdict for the sum of \$275, upon which verdict judgment was duly rendered.

Messrs. TELLER and ORAHOD, for appellant.

Messrs. THOMAS J. CANTLON and JOHN C. FITNAM, for appellee.

HELM, J. It is conceded that the defendant company was in possession of the right of way lawfully, and that it was engaged in the prosecution of a lawful enterprise. It is further conceded that there was no actual intention to injure plaintiff. No direct evidence was offered to show negligence or carelessness in the blasting. And unless the fact of the missiles falling upon plaintiff's premises, and the consequent danger and damage, be regarded as proof of negligence, or create a presumption of negligence, we must assume that defendants proceeded with ordinary care and caution.

The principal question submitted for adjudication is as follows: Was plaintiff, under the circumstances, entitled, as a matter of law, to recover? Defendants did not plead or prove any authority, either by contract or by compliance with law, to cast the fragments of earth and rock

upon plaintiff's premises. Legal possession by the company of a right of way over adjacent land, and authority to construct and operate its railroad thereon, did not, of themselves, authorize or sanction a direct intrusion and trespass upon plaintiff's private property. *St. Peter v. Denison*, 58 N. Y. 416; *Hay v. Cohoes Co.* 2 N. Y. 159; *Scott v. Bay*, 3 Md. 431.

Counsel for defendants rely in argument upon the proposition thus stated in their brief: "If damage result from doing a lawful act in a lawful manner, no recovery can be had." It is true that an act may produce both injury and damage, yet no right of action exists in favor of the party aggrieved. But the proposition of counsel must be accepted with the proviso that the act, or the manner of its performance, do not result in the invasion of the legal rights of another. This proviso is fairly implied by counsel's language; for, if such rights are directly abridged, the act and the manner of its performance cannot both be "lawful." In general, if a voluntary act, lawful in itself, may naturally result in the injury of another, or the violation of his legal rights, the actor must at his peril see to it that such injury or such violation does not follow, or he must expect to respond in damages therefor; and this is true regardless of the motive or the degree of care with which the act is performed. See the following cases, and others cited therein: *Hay v. Cohoes Co.* 2 N. Y. *supra*; *Tremain v. Cohoes Co.* 2 N. Y. 163; *Cahill v. Eastman*, 18 Minn. 324 (Gil. 292); *Phinzy v. Augusta*, 47 Ga. 260; *Rylands v. Fletcher*, L. R. 3 H. L. 330; *St. Peter v. Denison*, 58 N. Y. *supra*; *Wilson v. New Bedford*, 108 Mass. 261; *Scott v. Bay*, 3 Md. *supra*; *Cooper v. Randall*, 53 Ill. 24.

Plaintiff in the case at bar was entitled to the undisturbed possession, use and enjoyment of his premises, and to the rents and profits therefrom. These were *legal rights* with which defendants could not in law so justify direct interference as to escape accountability. Perhaps,

on the ground of public policy, an injunction to restrain the excavating of defendant company's road-bed would not have issued at the suit of plaintiff, even though blasting were necessary; but public policy could not exonerate the company from liability for private damage directly resulting from its acts. The company was bound at its peril to see that plaintiff's rights of property were not injuriously affected. In so far as these rights were interfered with by defendants' acts, such acts were wrongful; and if the injuries complained of were the natural and proximate consequence thereof, plaintiff was entitled to recover.

"It is generally held that, in order to warrant a finding that * * * an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the * * * wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." *Milwaukee, etc. R. R. v. Kellogg*, 94 U. S. 469; Cooley, Torts, p. 69, and note 1, p. 70.

Speaking of *Hay v. Cohoes Co.*, *supra*, the supreme court of Missouri uses the following language: "The scattering of the fragments of rock in all directions, beyond the control of the party, was a natural consequence of the blasting, and must have been foreseen as probable." *Miller v. Martin*, 16 Mo. 508.

In considering this question, juries are usually called upon to inquire whether, among all the specific circumstances, there appears an intermediate cause between the act or wrong complained of and the injury produced. And, if "there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it." *Milwaukee, etc. R. R. v. Kellogg*, *supra*.

Looking to the circumstances in the case before us for an intervening cause, the jury could not reasonably have

found one. The casting of the rock and *debris* upon plaintiff's premises was the wrongful act. The damage to the buildings struck, and the frightening away of his tenants, were the direct and proximate effects. Upon some of the minor questions involved, the evidence might have been more satisfactory; but we cannot pronounce it wholly inadequate to sustain a finding that actual danger existed from the falling missiles, whereby certain tenants were reasonably induced to vacate the premises, and other persons deterred from leasing. We do not feel warranted in disturbing the verdict for insufficiency of the evidence.

If the court erred in charging the jury, it was in defendants' favor. The instruction, given upon defendants' request, that "plaintiff is not entitled to recover anything in the way of damages arising necessarily from the proper execution of the work," might possibly have misled the jury; but their verdict clearly shows that it did not; and, besides, had it done so, it is obvious that defendants could not complain. If it be true that this instruction conflicts with another, such conflict could in no way have prejudiced defendants, or either of them. Our views of the law already announced obviates the necessity of discussing further objections to the charge.

It is assigned for error that while upon the witness stand plaintiff was asked, "Could you not have rented these tenements but for the railway?" and answered, "I think I could." No question of science, skill or trade was being inquired into. The belief of plaintiff was based upon facts within his own actual knowledge. These facts were detailed by him to the jury, in connection with the testimony objected to. The cause of plaintiff's failure to rent his premises was the gist of the investigation; it was one of the ultimate facts to be established. Under the circumstances, the court did not err in receiving the opinion of plaintiff, if opinion it can

be called. *Hannah v. Barker*, 6 Colo. 303; 1 Greenl. Ev. § 440, and notes; opinion of Doe, J., in *State v. Pike*, 49 N. H. 408.

The judgment of the court below is affirmed.

Affirmed.

G., B. & L. R'Y Co. ET AL. V. DOYLE.

Where damages claimed result through the frightening away of guests from plaintiff's hotel by the blasting of defendant, evidence of injuries to adjacent buildings, caused by rocks cast upon them through such blasting, is competent as bearing upon the reasonableness of the fears of injury entertained by such guests.

Appeal from County Court of Clear Creek County.

THIS case, like that of *G., B. & L. R'y Co. v. Eagles, ante*, is an action for damages occasioned by blasting in the excavation of the defendant company's road-bed. Sarah Doyle, who was plaintiff below, owned a certain building in Georgetown near the place where defendant was doing its work. This building she was using as a hotel, and when defendant's excavating commenced she had considerable patronage. The averments of the complaint, which the proofs tend to support, show that pieces of rock and *debris* were hurled into the air by defendant's blasts and fell upon plaintiff's premises; that danger to person and property was thus occasioned; that the explosions and the rocks falling upon and around plaintiff's hotel excited terror in the minds of her guests, which led them to abandon her house; and that for a considerable period of time her business was thus completely destroyed. Verdict and judgment in plaintiff's favor for \$168.

Messrs. TELLER and ORAHOOD, for appellant.

Messrs. THOMAS J. CANTLON and JOHN C. FITNAM, for appellee.

HELM, J. The main question submitted in this case is precisely similar to that considered in *G., B. & L. R'y Co. v. Eagles*, ante. The same considerations are here pertinent, and are equally decisive. Our conclusions, therefore, upon this question need not be restated. The amendment made by the court to defendant's instruction was not error. The instruction as finally given was consistent with the law as understood by us, and announced in the opinion mentioned.

But a single additional assignment of error need be noticed. Testimony was received showing injury to buildings belonging to other persons, but situated in the vicinity of plaintiff's hotel. It is insisted that this testimony was not admissible, and that its reception constituted a fatal error. Such evidence was not competent to show the amount of plaintiff's damages, nor was it offered or received for this purpose. But an important question upon which the jury, in our judgment, were called to pass, related to the danger occasioned by the falling rock and *debris*. If the fears of plaintiff's guests were unreasonable and groundless, their fright and departure should not lay the foundation of a claim for damages against defendant. The recovery should be confined at least to nominal damages. As bearing upon this question, we think the testimony was admissible. The fact that other buildings in the neighborhood had been struck, that rocks weighing from two to three hundred pounds crashed into and through other houses near by, tended to establish the character and reality of the danger actually existing, and to warrant the feeling of insecurity which deprived the hotel of patronage.

While the presence of danger from falling fragments of earth and rock is sufficiently shown, the evidence in this case, as in the *Eagles Case*, is in some other respects not strong or satisfactory; but we do not feel justified on this account in setting aside the verdict. The judgment is affirmed.

Affirmed.

MILLER V. HALLOCK.

It is not enough that the evidence of the plaintiff shows a case that calls for some relief; to entitle himself to judgment he must show himself entitled to the relief called for by the facts stated in the complaint. The allegations of the complaint, the evidence and the finding should correspond in legal intent.

9	551
16	318
9	551
17	376
9	551
2a	234
9	551
2	163
9	551
35	71

Error to County Court of Arapahoe County.

THIS was an action instituted by the plaintiff in error to recover the alleged contract price of a quantity of wood delivered by said plaintiff to the defendant in error. The complaint states that the wood was delivered on a contract entered into between the parties. It alleges that "during the months of September and October, 1882, the said plaintiff sold and delivered to the said defendant one hundred and ninety-five and three-fourths cords of wood, in consideration for which the said defendant then agreed and promised to pay plaintiff the sum of \$496.23, which said defendant has wholly failed and neglected to do, and said sum of \$496.23 remains due and unpaid, for which plaintiff prays judgment and for costs of suit." The defendant's answer contains a specific denial of each allegation in the complaint. The only witness sworn was the plaintiff, who testified in his own behalf, against the objections of the defendant, that a man by name of Sargent came to his residence in Jefferson county, representing himself to be defendant's agent, and purchased for defendant two hundred and fifty cords of wood, agreeing to pay \$2.50 per cord for — cords, and \$2.65 per cord for the balance. Sargent directed the wood to be shipped direct to the defendant, and agreed that defendant should pay the freight. Plaintiff, believing the stranger to be the agent of Mr. Hallock, undertook the fulfillment of the contract and shipped wood to Mr. Hallock by railway for three weeks, and then came to the city to see about the matter. When he met the defend-

ant the latter told him that he had purchased the wood from Sargent and had overpaid him for the quantity received, and that plaintiff had better look to Sargent, as he did not propose to pay twice for it. Defendant had used part of the wood received, and the balance was in defendant's yard. Defendant's counsel objected to any testimony of the alleged contract until the agency of Sargent should be first shown. The trial was to the court, who stated that the testimony would be received, but disregarded unless the agency was shown. The plaintiff having no proof of the alleged agency, the court, at the conclusion of his testimony, sustained the defendant's motion for a nonsuit.

MESSRS. ROGERS and McCORD, for appellant.

MESSRS. DECKER and YONLEY, for appellee.

BECK, C. J. It is conceded by the parties to this cause that the man Sargent, who procured the shipment of the wood from the plaintiff Miller to the defendant Hallock, was a swindler, and that both plaintiff and defendant acted in good faith. Plaintiff's counsel contends that the plaintiff is entitled to compensation from Hallock for his wood, because it was neither sold nor delivered to Sargent, but shipped to, received by, and converted to the use of, said defendant. In support of this theory, counsel cite the following cases, which are clearly analogous to this case, so far as the facts are concerned, and which seem to sustain the rule of liability contended for: *Hamet v. Letcher*, 37 Ohio St. 356; *Barker v. Dinsmore*, 72 Pa. St. 427; *Klein v. Seibold*, 89 Ill. 540; *Barnard v. Campbell*, 55 N. Y. 457; *Moody v. Blake*, 117 Mass. 23.

The theory of the defense, however, is unanswerable so far as the present action is concerned. It is that the complaint counts upon a contract for the sale of the wood, alleged to have been entered into between the plaintiff and defendant, whereas the proof wholly failed to sustain

the allegation. The cause and character of the actions in the cases above cited were wholly different from the action instituted in this case. The former were actions to recover back the specific property which had been fraudulently obtained from the owners, or, where the property itself could not be recovered, to recover the value thereof from the persons who had converted it to their own uses. Here the action brought is upon an alleged contract entered into by the parties specifying the quantity of wood to be delivered by the plaintiff, and the price to be paid therefor by the defendant. No such contract having been made, of course it could not be proved, and the court was compelled to grant a nonsuit. There was a fatal variance between the allegations of the complaint and the proofs. In such a case it is not enough that the evidence of the plaintiff show a case that calls for some relief. To entitle him to judgment he must show himself entitled to the relief called for by the facts stated in his complaint. As stated by the supreme court of California in *Mondran v. Goux*, 51 Cal. 151: "The rule is well settled that the plaintiff must recover, if at all, upon the cause of action set out in his complaint and not upon some other which may be developed by the proofs."

A cause of action is a wrong committed or threatened. It may consist of the wrongful conversion of property, or of the non-performance of an agreement. In one case the cause of action would sound in tort, the other in contract; and, while the relief sought might relate to the same subject-matter, yet proof of facts sufficient to sustain an action for the tort would be insufficient to sustain an action for the non-performance of the agreement, for the reason that the *probata* would not correspond with the *allegata*. The complaint would state one cause of action, every material averment of which might be controverted and put in issue by the answer of the defendant, while the facts proved would be foreign to the issues joined. That is just the case here presented. The com-

plaint states a cause of action arising *ex contractu*, and each material averment thereof has been controverted and put in issue by the answer of the defendant, in the exercise of his legal rights. The proofs introduced and offered in evidence tended to establish a cause of action arising *ex delicto*. "A party can have no relief beyond what the averments of his pleadings entitle him to." The allegations of the complaint, the evidence, and the finding should correspond in legal intent. *Tucker v. Parks*, 7 Colo. 62; 1 Pac. Rep. 427; *Gregory v. Haworth*, 25 Cal. 656.

The judgment must be affirmed.

Affirmed.

9	554
10a	418
9	554
80	109
9	554
134	276
9	554
37	376
38	447

CITY OF DENVER V. RHODES.

1. While a municipal corporation cannot be compelled to provide water-ways of sufficient capacity to carry off all surface waters likely to accumulate in the streets, yet such as the city has provided it is bound to keep in repair and free from obstructions, so that, up to their original capacity, they shall be efficient.
2. The rule that there is no implied liability for damages necessarily occasioned by the construction of a municipal improvement is subject to the qualification that a liability arises for all damages not necessarily incident to the work, and which are chargeable to the improper or unskilful manner of executing it.
3. A municipal corporation is required to execute the work of constructing a public improvement, such as a sewer, in a careful and skilful manner; and if, by reason of the neglect or want of skill of the persons engaged in the work, property of a citizen built with reference to an established grade is injured by surface water, the proper channels for the flow of which are obstructed, the city is liable.
4. The construction of a sewer, under a statute authorizing the passage of a city ordinance providing for such construction, is not a *public work* for the benefit of the people of the state, so as to shield the corporation from liability to persons whose property is damaged during the progress of the work.
5. When a municipality undertakes a public improvement, such as the construction of a sewer, it is bound to exercise the same degree of

care and prudence that a cautious individual would do if the whole loss or risk were his own; and it is liable, like an individual, for damages resulting from negligence or omission of duty.

6. A supervisory control over the work, and the discretionary power of the contract itself, establish the relation of principal and agent between the city and its contractor. In such case the rule is that the employer is liable for the negligence or misconduct of the contractor.

Appeal from Superior Court of City of Denver.

THIS was an action brought by Rhodes against the city of Denver to recover for damages alleged to have been done to his stock in trade by backwater from obstructions in Fifteenth street, during a shower of rain. The plaintiff was a baker by occupation, and at the time the cause of action arose was the lessee of the basement rooms, and the areas adjoining, of a brick building erected and owned by one William J. Barker, situated on the corner of Fifteenth and Stout streets. Long previous to the time mentioned, these streets had been graded, and furnished with gutters for conducting surface water; and all water falling or accumulating in Fifteenth street, and in Stout street near its crossing with the latter, was conducted down Fifteenth street to the Platte river. These streets cross each other at a right angle. The course of Fifteenth street is northwest and southeast. Consequently the left side, as one goes up street, or southeast, is called the easterly side, and the opposite the westerly side. The Barker building is on the westerly side, and on the south side of Stout street. The obstruction was opposite the centers of the blocks immediately below, or northward of this building. It was caused by an excavation made across the street for the purpose of laying therein a pipe-sewer, the earth excavated being thrown out on both sides of the cut, and the sides thereof being shored up with boards. The trench for the sewer pipe had been excavated from the alley on the easterly side of the street entirely across it, and several feet into the opposite alley. The testimony is conflicting as to the

precise condition of the work when the rain occurred which did the damage. The depth of the excavation was from ten to fifteen feet. The embankment of earth thrown out of this trench appears, from the testimony, to have been from two to three feet high on both sides thereof when the excavation was made. The open spaces or areas adjoining the building occupied by the plaintiff were made by excavating away the earth on both fronts, erecting retaining walls, and covering the areas so made by the sidewalks. The basement apartments under said buildings were connected with these areas by means of doors in the basement or outer walls. Light to the areas was furnished from the outside, and also a passage-way thereto, by means of openings in the sidewalks, all being made close to the walls of the building, and all protected by iron railings. These outside improvements were made under a license or permit granted by the mayor of the city to said William J. Barker at the time he was erecting the building. It was in these basement rooms that the plaintiff carried on his bakery business. The answer alleges, and testimony was introduced on part of the city to prove, that the areas were improperly and insecurely constructed, and consequently contributed to the injury done to plaintiff's property.

The rain-fall occurred about 12:30 P. M. on July 30, 1881, and the obstruction in the street caused the water to flow back past the Barker building to California street, the next street beyond. The water flowed into and filled up the basement and areas occupied by the plaintiff, causing the retaining walls of the areas to give way, and the sidewalk to fall in, and causing great damage to the plaintiff's property.

The cause was first tried in the county court, resulting in a verdict and judgment for the plaintiff of \$1,722.29, and afterwards in the superior court of the city of Denver, resulting in a verdict for the plaintiff of \$1,722.19.

At the close of the plaintiff's direct proof in the last trial, counsel for the city moved for a judgment of nonsuit, which was denied, and it is earnestly contended that this ruling was erroneous. The motion was as follows: "Defendant's counsel now move the court for a judgment herein as of nonsuit, for the following reasons: That in a case of this kind, assuming the facts to be as the plaintiff shows them, for the purpose of the motion, and they are simply these: that the city, through its contractor, was legally and properly constructing a sewer; that an unusual flood of water occurred, that could not have been expected; nobody was expected to provide for any such flow of water,—conceding that the sewer caused in part the damages, or even in whole the damages, yet there is no legal liability against the city, it being a municipality. There is a difference in principle in the case of a municipality and in the case of a private corporation or individual, because one is the representative of the public, and in the construction of the sewer was doing a public work for the public benefit, and the municipality would not be liable. Again, where the damages are caused by an unusual flood of rain, there can be no liability against any one under any circumstances, because it was not negligent to fail to prepare for such a thing; also that the evidence shows, if there was negligence, it was that of the contractor, and not that of the city. Yet there is no wrong shown by the evidence on the part of the contractor or the defendant here, unless it be inferred from the evidence which tends to show that Williams refused to break down some boards which might have prevented the injury at the time of the rainfall."

Mr. F. TILFORD, City Attorney, and Messrs. STALLCUP and GILMORE, for appellant.

Messrs. ROCKWELL and ROWELL, for appellee.

BECK, C. J. The first proposition advanced in behalf of the city is that, "from the record in this case, it is apparent that the well-settled principles of law have been violated again that a plaintiff might have judgment against a municipal corporation." Our first inquiry will be, What are these well-settled principles of law which have been so violated? for no judgment thus secured, whether for or against a municipal corporation, can be permitted to stand. One of the prominent grounds of complaint is stated in the appellant's *second* assignment of error, viz.: "The said court erred in overruling and denying the motion of this appellant for a nonsuit when this appellee had rested his case on the trial thereof." We may reasonably expect, therefore, to find in this motion, as filed, a statement of some of these well-settled principles which, in the opinion of counsel, were violated on the trial of this cause.

Referring to the motion, its propositions may be formulated as follows: (1) Assuming the facts to be as shown by the plaintiff's witnesses, and that the condition of the work caused the damages complained of, the city is not liable, because it was, by its contractor, legally and properly constructing a sewer, when an unusual flood of water occurred. (2) A municipality is the representative of the public, and when engaged in the construction of a sewer is doing a public work for the public benefit, and is therefore not subject to the rule of liability which obtains as to private corporations and individuals. (3) No one is liable for damages caused by an unusual flood of rain, because there is no negligence in failing to provide therefor. (4) If there was negligence or wrong in the prosecution of the work, it was on the part of the contractor and not of the city. (5) There was no wrong on part of the contractor, unless it be inferred from his refusal to break down some boards at the time of the rainfall, which might have prevented the injury, and for this the city is not liable.

1. Was the city, by its contractor, legally and properly constructing a sewer when the rain occurred? It must be borne in mind that Fifteenth street, across which the sewer was being constructed, had been previously graded and improved, and likewise that portion of Stout street lying in the immediate vicinity. Both streets had been furnished with drains or gutters for the flow of surface water, and the character of the improvements was such that surface waters flowing into Fifteenth street at and above the plaintiff's corner, and accumulating in its vicinity, were drained and caused to flow away from the plaintiff's place of business, down Fifteenth street, past the point of obstruction and into the Platte river; also that the sewer in course of construction was not a street improvement, but an under-ground pipe-sewer.

(a) A preliminary inquiry arises as to the manner in which the work was being done, and what precautions were being taken to guard against injury to property in the vicinity. It is asserted by defendant's counsel that the assumed reason assigned by the trial judge for denying the motion for nonsuit, and for submitting the cause to the jury, did not exist, and he appeals to the testimony of plaintiff's witnesses to sustain his assertion. The reason assigned by the court was that "there was evidence tending to show that, at the time of the extraordinary rain, the entire street was obstructed, so there could be no flow of water down either side." Was this a misrepresentation of the testimony then before the court?

The first witness called by the plaintiff was C. H. McLaughlin, who was at the time president of the city council. Upon the point in question he testified that the embankment of earth on either side of the trench which had been excavated across Fifteenth street was from two to three feet high; that the water in the center of the square above was over his boot-tops, and that he saw no provision made for the flowing of waters through the gutters; that the work should have been finished up by

leveling down, so that a portion of the street would have been open at the time. D. J. Cook, chief of police, said it was his impression that the street was dammed up clear across, but was not certain. Teams could not cross, and he thought the obstruction was such that water could not flow down the center of the street. The dam was such that water was backed up to California street, which was the second street above. The obstruction extended into the alley on the westerly side; and, while he did not know positively about the easterly side, he did know, from the grade of the surface, that if unobstructed, the water would have flowed down that side, so as not to have run into plaintiff's cellar. Edward Scholtz stated it to be his recollection that the obstructions extended entirely across the street, and that the water was dammed up above the same, while below there was very little standing water. T. G. Anderson, who occupied the opposite corner from the plaintiff, on the westerly side of Fifteenth street, said a few of the piling boards in the excavation had been removed, but the embankment of earth on both sides of the trench was in such condition that teams could not pass; that water above the trench was two feet deep, extending clear across the street, and was backed up to California street. It could not run down street until it rose high enough to run over the embankment. William Anderson, son of the last witness, corroborated his father's statements. James Lawson, who had a store in a building on the easterly side of the street, on the alley, said the work was finished on that side, the earth cleared away, and the piling boards taken out to the center of the street, when the rain came. He said, further, that the obstruction on the westerly side of the street caused the water to flow in a stream over to his side, so as to cover the sidewalk and run into his store. Louis Boyvin, who had a store in the same block, on the corner of Stout and Fifteenth streets, said the street was obstructed on that side, the gutter was filled up like the trench, but the side-

walk was clear; that some one shoveled away the dirt, and let the water out. As soon as the opening was made the water receded. He was asked what there was to open, and answered, "A dam made of sand left after filling the trench." A. H. Buhler, who worked in a store situated on the corner of the alley on the opposite or westerly side of the street, testified that the street was filled up with earth thrown out of the trench clear across from one sidewalk to the other. He also testified to the flooding of the street, and the back flow of water as far up the street as he could see.

The testimony is all positive on the point that the water was dammed up below the plaintiff's premises at the trench, and caused to flow back and submerge his sidewalk, and to flow down through the openings therein into the basement and areas, so as to fill them full. We do not hesitate, in view of this testimony, to affirm the statement of the trial judge that there was testimony tending to show that the entire street crossing was obstructed during the rain, so there could be no flow of water down either side.

(b) Was this a legal and proper construction, across an improved street, of an under-ground pipe-sewer? The general rule of law laid down by many respectable authorities, and adopted by this court, concerning the obstruction of water-ways, is that municipal corporations cannot be compelled to provide water-ways of sufficient capacity to carry off all surface waters likely to accumulate in the streets; but such as the city has provided it shall keep in repair and free from obstructions, so that, up to their original capacity, they shall be efficient. *City of Denver v. Capelli*, 4 Colo. 25; *Nims v. Mayor*, 59 N. Y. 500; *Shear. & R. Neg.* § 151. The rule of law that there is no implied liability for damages necessarily occasioned by the construction of a municipal improvement is held to be subject to the qualification that a liability arises for all damages not necessarily incident to

the work, and which are chargeable to the improper or unskilful manner of executing it. 2 Dill. Mun. Corp. § 1050. When a citizen erects a building, and otherwise improves his property, with reference to established grades, and other street improvements of the character here shown to have existed, a municipal liability arises, either from a negligent execution of a corporate work, by reason whereof the streets and gutters are so obstructed as to cause his property to be flooded with water and damaged, or from a negligent failure to keep the water-ways in repair, whereby the like injuries are occasioned. *Powers v. City of Council Bluffs*, 50 Iowa, 197; 2 Dill. Mun. Corp. §§ 1050, 1051. The municipality, in such cases, is required to execute the work in a careful and skilful manner, and is held liable for negligence or unskilfulness in the execution of the work, resulting in damage to property, where no fault of the owner contributes thereto. It may therefore be laid down as a proposition of law applicable to this case, that if the street and gutters were so obstructed by the city, or by its authority, during the rain storm, as to cause the falling water to dam up entirely across said street, and to flow back from such obstruction into the basement and areas occupied by the plaintiff, and to damage his property, and if the streets on which his bakery was located were so graded and improved that but for said obstruction the water which occasioned the damage would have been conducted harmlessly away therefrom, then the work of constructing said under-ground sewer was not conducted with that degree of prudence, care and skill which the law requires.

2. The point raised, that the city was engaged in the construction of a public work for the benefit of the public, and for that reason was not liable for damages, is not correct either as to the proposition of fact or of law, if by the terms "public" and "public work" the public generally and a work in which the state is interested be

intended. As we have already seen, the work involved was the laying of an under-ground pipe-sewer. In the nature of things, this work could not benefit the general public or the state, but the city only. That the work was authorized by an act of the legislature, as alleged in the defendant's answer, does not change the fact. That act is amendatory to the city charter, and authorizes the city, by virtue of an ordinance to be passed in conformity with its provisions, to adopt a plan of sewerage, and to construct sewers through and along the streets and alleys of the city. It therefore plainly appears from the act itself that the work authorized was for the benefit of the city alone, and that the general public or the state was not to be benefited thereby, as in the case of public highways, or of enterprises in which the public generally are beneficially interested. *City of Chicago v. Joney*, 60 Ill. 383; *Same v. Dermody*, 61 Ill. 431.

Nor is the further proposition maintainable, that a different rule of liability exists where a work of this character is being constructed by a municipality from that applicable to an individual in a similar case. When a municipality undertakes such a work, it is bound to exercise the same degree of care and prudence a cautious individual would do if the whole loss or risk were his own; and it is liable, like an individual, for damages resulting from negligence or omission of duty. *Shear. & R. Neg.* § 144; *Harper v. City of Milwaukee*, 30 Wis. 372; *Barton v. City of Syracuse*, 36 N. Y. 54. It is held that a municipal corporation is not liable to an action for a failure or neglect to make corporate improvements, such as grading streets, making drains, sewers, and the like, for the reason that such powers are *quasi* judicial and discretionary, to be exercised as the public interest may require. It is likewise held that such corporation is not liable for an error of judgment in adopting an injudicious plan, or one of insufficient capacity for the purpose intended. But there is great unanimity in the

authorities upon the point that where the plan of a municipal work, such as gutters, drains and sewers, has been determined upon, the work of constructing them is ministerial, and must be performed in a skilful, prudent and careful manner, so as not to injure private property; also that the municipality is liable in a civil action for damages caused by the careless or unskilful manner of performing the work, or for a failure of its duty to keep the same in good condition and repair. 2 Dill. Mun. Corp. § 1049; *City of Logansport v. Wright*, 25 Ind. 512; *Mills v. City of Brooklyn*, 32 N. Y. 489; *McCarthy v. City of Syracuse*, 46 N. Y. 196; *Barton v. City of Syracuse*, *supra*. It was held in *Nims v. Mayor*, 59 N. Y. 508, that the city was liable for any neglect in the proper maintenance of a sewer, or for changes or alterations made by the city, or with the knowledge of the city officers, in its structure, by means of which the waters were obstructed in their passage, and damage ensued to others.

3. The proposition that no one is liable for damages caused by an unusual flood of rain, because there is no negligence in failing to provide therefor, if correct as to any class of circumstances, does not justify the total obstruction of a street so improved that no damage would have been suffered if proper passages had been left for the escape of the water. We know of no rule of law or legal principle which can be invoked in support of this third proposition which will make it applicable to the facts and circumstances of this case. An "unusual flood of rain" does not indicate a greater or more severe rain than has theretofore occurred, but rather such a rain as does not usually, or but rarely occur.

The rule is laid down in *Mayor v. Bailey*, 2 Denio, 440, 441, that in the construction of a public work which may be called upon to resist sudden freshets, like a dam across a stream of water, the degree of care or foresight which it is necessary to use must always be in proportion to the

injury likely to result from the event to be guarded against; also that such a flood as had been known to occur upon a stream within the memory of man should have been anticipated by those in charge of the work of construction. In that case there was testimony that, more than twenty years previous to the injury complained of, a somewhat greater flood occurred; that one as great occurred four years previous; and another, nearly as great, had occurred two years previous. The court say: "If the evidence of those witnesses is to be credited, therefore, the flood of 1841 was an occurrence which ordinary care and prudence should have anticipated and guarded against."

In *Powers v. City of Council Bluffs*, *supra*, it was relied on as matter of defense that the rain-fall which occasioned the damage was an extraordinary one. Witnesses testified that many severe rain-storms had occurred in the vicinity; and defendant's counsel admitted that two storms had occurred, one *seventeen* and the other *six* years previously, which were about equal in force and violence to the one in question. The court held it to have been the duty of the city to make provision for such floods as may be expected, judging from such as had previously occurred.

In *City of Denver v. Capelli*, 4 Colo. 29, error was assigned upon an instruction informing the jury, in substance, that such a rain-fall as had not been of frequent, but had been of occasional, occurrence within the knowledge of persons then living in the city, could not be said to be the act of God; and that, if said rain-fall might have reasonably been anticipated from past experience, no matter how great or violent, the defense based thereon must fail. The only error pointed out by the court in reviewing this instruction was that the court thought it was "so worded as to create the impression upon the minds of the jury that it was the duty of the defendant, possessed of the knowledge that extraordinary rain-falls

at more or less remote intervals had visited the city, to adopt such a system of drainage as would effectually protect property owners from injury resulting from the overflow of their premises occasioned by such unusual rain-falls;" whereas the law imposed no such duty.

As before stated, the rule in this state is that, while no legal obligation rests upon a municipal corporation to provide water-ways of sufficient capacity to protect the property of citizens from overflow and damage, yet such as have been provided must be kept in repair, and free from obstructions. This rule is subject to the right of the city to make necessary municipal improvements in a prudent and skilful manner, although the work may cause a partial obstruction of an improved street. In the present case the evidence on the part of the plaintiff tends to show that the work of constructing the sewer across the street was carelessly and injudiciously performed; also that the street improvements were of sufficient capacity to have protected the property from damage, if the work had been properly conducted. The shower which occasioned the damage in the present instance was a severe one, but it is only necessary to refer to the testimony on this point, which was produced on part of the defendant, to see that it was by no means unprecedented. Frank M. Neal, the signal officer in Denver, said it was unusual, but he thought the amount of rain or hail which fell in the month of May preceding was equal or greater, but it was in the form of ice, or wet, heavy snow. Thomas Williams, a brother of the contractor, said he never saw such a rain in all his life. Richard Sopris, then mayor of the city, and who had resided therein twenty-four years, on being asked what kind of a rain it was with reference to the rains in this country, answered: "Well, it was a harder rain than we usually have had in Denver, and the heaviest part of it fell south of this locality." On cross-examination he was asked whether he had known of other rains that

would be called unusual. His answer was: "I have seen some pretty hard rains here. *Question.* How many? *Answer.* A half a dozen at any rate." Frank Sweedy, in answer to the question what kind of a rain it was, replied: "A pretty big, heavy rain. *Question.* A great fall of water, was it? *Answer.* Yes, sir."

In view of the evidence, we think the severity of the rain-storm did not constitute a defense to the action.

4. The next defensive position assumed is, if there was negligence or wrong in the prosecution of the work, it was on the part of the contractor, and not of the city. Two points appear to be relied upon in support of this proposition: *First*, that the legislature, by an act passed in 1879, had required the work to be let by contract to the lowest bidder; *second*, that the person to whom the work was let was an independent contractor; consequently the city was not liable.

The answer sets out that a system of sewerage was provided by an ordinance duly passed and adopted in conformity with the legislative act just referred to, which, among other things, provided for the construction of the sewer in question across Fifteenth street; that a contract for its construction was let to one Joseph Williams, who was prosecuting the work thereunder at the time of the rain-fall. The legislative act mentioned was an enabling act amendatory of the city charter; and, while it required contracts of this character to be let to the lowest responsible bidder, it did not divest the city authorities of control over the contractor and the work. The specifications of the contract, introduced by the plaintiff, show that the city retained a supervisory control over the work. It was to be performed under the direction of the city engineer and the city sewer committee. Power to make alterations in the manner, extent and plan of the work, as it progressed, was reserved, as was also authority to annul the contract, and to relet the work to another contractor in case Williams failed to

comply with the terms of his contract. Among other reservations of authority and control over the work is the following: "(41) The contractor shall commence the work at such points as the engineer and sewer committee may direct, and shall conform to their directions as to the order of time in which the different parts of the work shall be done, as well as to all the engineer's other instructions as to the mode of doing the same, including the length of street or alley that may be taken up in advance of the back filling." Two conclusions arise from the foregoing: one, that it was not deemed necessary, either by the city or its contractor, in excavating for and laying the sewer pipe across a street, to obstruct the entire street crossing; the other, that it was the duty of the city engineer to decide how many feet of the street crossing might be excavated in advance of restoring the part previously excavated to its original condition. It is evident that the legislative act furnishes no ground for exempting the city from liability.

Was Williams an independent contractor? It is elementary that the doctrine of *respondeat superior* does not extend to independent contracts; that is to say, to such contracts as leave the party for whom the work is to be done no choice in the selection of the workmen and no control over the manner of doing the work under the contract. Clearly, this case does not come within the principle stated. The city had complete jurisdiction and control of the streets, sidewalks, sewers and public works and municipal improvements generally, with power to adopt systems and plans for the construction of all improvements, and with a supervisory control over the work of construction. In such cases the primary responsibility rests upon the city to keep its improvements in repair and in an effective condition. For negligence in the performance of these duties, resulting in injury to the persons or property of citizens, the corporation must respond in damages, provided the parties injured are free

from contributory negligence. The contract with Williams was not an independent contract. The supervisory control over the work, and the discretionary power over the contract itself, establish the relation of principal and agent between the city and its contractor. In such case the rule is that the employer is liable for the negligence or misconduct of the contractor. *City of Chicago v. Joney*, *supra*; *Same v. Dermody*, *supra*; *City of Detroit v. Corey*, 9 Mich. 165; *Harper v. City of Milwaukee*, 30 Wis. 372.

The last point raised and relied upon in support of the alleged error in denying the motion for nonsuit is that the city cannot be held liable for the refusal of the contractor to break down certain boards placed in the sewer-trench for shoring purposes, which, if done, might have prevented the injury. It is insisted that what occurred at this time was collateral to and independent of the course of the work. This is not a legitimate point in the case, and is not and cannot be assigned for error, for the reason that the court, at the request of the defendant, instructed the jury in accordance with the counsel's view as above expressed.

For the reasons assigned, we are of opinion that no error was committed in denying the motion for a nonsuit.

We now pass to another defense, styled in defendant's brief, "The law concerning surface water." If we correctly interpret the proposition, it is that the condition of the work in progress, and the obstruction of the streets and sewers, was not the direct cause of the injury to plaintiff's property, but it required an unusual and unparalleled rain-fall, and the gathering of an unusual amount of surface water, to connect them in the remotest degree. Another allegation is: "He who has property where surface water, in a great rain-fall, may reach it, is unfortunate, whether he be negligent or not. Those who would escape it must flee to the high hills or mount-

ains." The cases cited in support of these propositions relate almost exclusively to the sufficiency of the plan or system of improvements adopted by a municipal corporation, or to the failure of such corporation to adopt plans and make improvements sufficient to afford protection to the property of citizens from overflow in time of severe rain-falls and freshets. These cases are based upon the principle that there is no liability for a failure to exercise the powers possessed by a municipal corporation to improve its streets, construct gutters, or to provide other means of drainage for surface water. It is evident, from authorities already cited, that this is a very different question from that upon which the present action is founded. Here the system of grading and for drainage of surface water had been adopted, and the work completed; and there was evidence tending to prove that but for the obstruction of the street and gutters all the surface water would have been carried off without injury to the plaintiff. The cases relating to the grading of streets involve another principle not applicable to the case at bar, viz., the right of a city to establish the grade of its streets, and then to reduce them to the grade so established, although the effect of the work, when completed, may be injurious to abutting property. The irrelevancy of the cases cited by counsel to the principles involved in the case here presented by the pleadings and evidence may be illustrated by the citation, *Alden v. City of Minneapolis*, 24 Minn. 261. The injury to plaintiff's property in this case appears to have resulted largely from the failure of the city to provide sufficient drainage. The streets had been reduced to the established grade, and the court say: "The improvements, as then made, were sufficient to carry off, as fast as collected, all surface waters accumulating there during ordinary rains, but were inadequate in very violent or heavy showers, such as those occasioning the damage in this case.

* * * There was no negligence or want of skill on

the part of the defendant in the making of those improvements, or in keeping them in proper repair." This class of cases has no application to a case wherein the street improvements are adequate, and the *gravamen* of the action is the injury arising from their obstruction.

It is a recognized rule of law that there is no implied liability for damages necessarily occasioned by the construction of any municipal improvement authorized by law; yet if there be negligence or want of skill in its execution, a liability arises for damages thus unnecessarily incurred. The result of Judge Dillon's inquiries concerning injury thus occasioned by surface water is to the same effect. It is that municipal corporations have a right to bring their streets to grade, and are not ordinarily liable for simply failing to provide culverts or gutters adequate to keep surface water off from adjoining lots *below grade*; but that they are liable where the property of private persons is flooded, either directly or by water being set back, where this is the result of the negligent execution of the plan adopted for the construction of gutters, drains, culverts or sewers, or of the negligent failure to keep the same in repair and free from obstruction, whether the lots are below the grade of the street or not; and he says there is great unanimity in the cases in support of these principles. 2 Dill. Mun. Corp. § 1051.

It is alleged in the answer, and proof to support the defense was produced on the trial, that the immediate cause of damage to plaintiff's property was the defective construction of the areas under the sidewalks in front of the building occupied by him, together with the openings made in said sidewalks to supply light and for a passageway to said areas. These were purely questions of fact, and were fairly submitted as such to the jury trying the cause. The jury did not sustain this defense, and we are

not able to say that the finding was contrary to the evidence produced.

We fail to discover any error sufficient to reverse this judgment. Judgment affirmed.

Affirmed.

9	572
18	542
9	572
17a	422

COWAN V. HALLACK.

1. Under the statute (Gen. St. p. 142) all promissory notes and instruments in writing for the payment of money are negotiable, whether so expressed or not; and whether the particular instrument contains the words "or order," or equivalent words, or not, its legal effect is the same as if it did contain such words.
2. To constitute a good promissory note no precise words of contract are necessary provided they amount, in legal effect, to a promise to pay.
3. Plaintiff sold to G. materials which G. used in constructing sidewalks on defendant's premises. At the request of plaintiff and G. defendant made and signed the following indorsement on the back of a bill of items of such materials prepared by plaintiff, and rendered to G.: "I hereby accept this bill, in compliance with the terms of contract and specification with Mr. H. A. Garvey, payable to E. F. Hallack thirty days after July 9, 1881." *Held*, that this indorsement was a negotiable instrument within the statute, and imported a consideration.
4. Such an indorsement is an unconditional promise to pay the money at a time named, and the defense that it was conditional on G.'s compliance with his contract with defendant, *held* bad on demurrer.

Error to County Court of Arapahoe County.

THE said plaintiff complains of the said defendant, and says that heretofore, to wit, on the 15th day of July, 1881, one Henry A. Garvey was indebted to the said plaintiff in the sum of \$277.84 for goods, wares and merchandise, before that time sold and delivered by plaintiff to the said Garvey, for which said goods, wares and merchandise a bill was made out by plaintiff against the said Garvey, and delivered to and approved by him, which

said bill, so made out and presented to and approved by the said Garvey, was in words and figures as follows, to wit:

"DENVER, COLO., July 15, 1881.

"Mr. H. A. Garvey bought of E. F. Hallack, manufacturer and wholesale and retail dealer in lumber, lath, shingles, sash, doors, blinds, mouldings, trimmings, paints, oils, window glass, roofing paper, pitch, building paper, cement, plaster of Paris, plastering hair, etc.:

June 21.	To 114 lbs. tarred felt, 8½	\$3 99
	Express charges	25
	To 15 bbls. Eng. Port. cement	108 00
June 27.	To 10 " " " "	72 00
June 27.	To 5 " " " "	36 00
July 2.	To 2 " " " "	14 40
July 5.	To 1 " " " "	7 20
July 6.	To 5 " " " "	36 00

\$277 84"

That said goods, wares and merchandise were used by the said Garvey in constructing sidewalks for the said defendant, and for which said materials the said defendant was indebted to the said Garvey, in consideration whereof the said defendant afterwards, to wit, on the day and year aforesaid, by his certain agreement in writing indorsed upon the said account, in words and figures as follows, to wit: "I hereby accept this bill in compliance with the terms of contract and specifications with Mr. H. A. Garvey, payable to E. F. Hallack thirty days after July 9, 1881," agreed to pay said plaintiff the said sum of \$277.84, which said acceptance and agreement was duly signed by the said defendant, by means whereof the said defendant then and there became liable to pay to the said plaintiff the said sum of money; that the same is now due and wholly unpaid. Wherefore plaintiff prays judgment for the sum of \$277.84 aforesaid, against the said defendant, for interest thereon, for costs of suit, and for other relief, etc.

Answer, general denial, no consideration. And for a

further and third defense herein the defendant saith that, at and before the time of the making and giving of the said supposed promise and acceptance set forth in the plaintiff's complaint, the defendant had made and entered into a contract and specifications in writing with the said H. A. Garvey (which are the same as mentioned in said complaint), whereby the said Garvey, for the sum of \$335, was to build and construct for this defendant certain sidewalks, coping, etc., of certain character and quality specifically set forth in the said contract and specifications, and said Garvey had procured certain material therefor, and entered upon the work therein provided to be done; that at the time this defendant had not become and was not in any manner indebted to said Garvey, nor was there in the said contract or specifications any provisions or obligations on the part of this defendant to accept any bill, account, indebtedness or claim owing from said Garvey to any person whatsoever, all of which was then well known to the said plaintiff; that the said Garvey being desirous to insure to the plaintiff payment of the plaintiff's said bill or claim, and the plaintiff desiring to secure the payment thereof, they, the said plaintiff and Garvey, applied to this defendant to agree to pay the same out of what might thereafter become due to the said Garvey from this defendant for work to be done under the contract and specifications aforesaid; that this defendant was willing to pay the amount thereof to the said Hallack, plaintiff aforesaid, provided said work should first be done by said Garvey in character and quality corresponding to and complying with the provisions and times of the said contract and specifications, and was unwilling to agree to pay to the plaintiff any sum of money whatsoever as aforesaid, except upon condition that, before being required to pay the same, the said work to be done by the said Garvey should, as to quality and character, be done in accordance with the terms and conditions of the said

contract and specifications, all of which was to the plaintiff then well known, and to all of which the plaintiff and said Garvey then and there acceded and consented. Defendant further avers that thereupon the said defendant, for the purpose aforesaid and no other purpose, as the plaintiff well knew, and as an accommodation to the plaintiff and the said Garvey, and without consideration, as the plaintiff also knew, wrote and indorsed upon the said bill or account mentioned in the said complaint the said indorsement of acceptance in the said complaint mentioned, and subscribed the same. And the defendant further avers that, according to the terms and conditions of said contract and specifications, no money whatsoever would or could become due thereon for the said work, or any part thereof, to the said Garvey until after said work should have been done corresponding to and complying in character and quality with the provisions of said contract and specifications, as the plaintiff also then well knew. And the defendant further avers that the said Garvey had not, at the time of the commencement of this action, nor has he since, done or performed the said work as in and by the said contract and specifications he agreed to do, and of the character and quality which, according to the said contract and specifications, he agreed to do, but hath failed and made default therein; nor hath the defendant accepted the said work, nor used the same, nor availed himself thereof, but hath refused so to do, and no money whatsoever has become due or owing to the said Garvey upon the said contract and specifications, nor for work to be done thereunder, because of the failure and default of the said Garvey as aforesaid; nor is the defendant now in any manner indebted to the said Garvey, nor hath he been at any time since the making of the said acceptance and promise, but, on the contrary thereof, the defendant hath, by reason of the default of the said Garvey, sustained damages in a large sum, to wit, to more than the

amount of the sum claimed and sued for by the plaintiff herein, and to more than the entire contract price of the work, etc., aforesaid. Wherefore the defendant demands judgment that he be hence dismissed, with his costs, etc.

Demurrer to the third defense sustained. Trial to the court, and judgment for the plaintiff for the sum of \$277.84. Error to the supreme court.

Messrs. BENEDICT and PHELPS, for plaintiff in error.

Messrs. DECKER and YONLEY, for defendant in error.

ELBERT, J. Hallack's account with Garvey, upon which the undertaking sued upon appears to have been indorsed, is an ordinary itemized statement by a merchant of his account with a debtor. The language of the undertaking so indorsed is as follows:

"I hereby accept this bill, in compliance with the terms of contract and specification with Mr. H. A. Garvey, payable to E. F. Hallack thirty days after July 9, 1881.

[Signed]

"E. R. COWAN."

The defense admitted the signature, and that no payment had been made. Aside from this, the undertaking was all the evidence introduced on the trial in the court below, and upon it the plaintiff recovered judgment. Two points are made by counsel: (1) That no consideration was alleged or proved; and that, therefore, the court erred in overruling the defendant's motion for a nonsuit; (2) that the court erred in sustaining the demurrer to the third defense.

It is well understood that in an action upon a simple contract, the plaintiff, in order to recover, must allege and prove a consideration. In this connection, however, it is to be remembered — *First*, that the admission of a consideration by the terms of the written contract is *prima facie* evidence of its existence, and satisfies the rule; *second*, that negotiable instruments import a consid-

eration, and are exceptions to the rule. 1 Pars. Cont. 430; 1 Daniel, Neg. Inst. § 161; *Whitney v. Stearns*, 16 Me. 394. We do not think that the instrument sued upon contains, by its terms, an admission of such a consideration as in itself relieved the plaintiff from the necessity of making proof of a consideration. It admits a contract with Garvey to accept, but it does not disclose any consideration for such a contract, and we are not at liberty to presume its existence. It would be illogical to treat that as a consideration which *itself* depends for its value and validity upon the existence of a consideration. Whether the writing imports a consideration is a more difficult question, and depends upon whether it is negotiable under the provisions of the statute concerning bonds, bills and promissory notes. Ch. 9, Gen. St. 142. Section 3 of the act provides that "all promissory notes, bonds, due-bills, and other instruments in writing, made by any person, whereby such person promises or agrees to pay any sum of money or article of personal property, or any sum of money in personal property, or acknowledges any sum of money or article of personal property to be due to any other person or persons, shall be taken to be due and payable to the person or persons to whom the said note, bond, bill, or other instrument in writing is made." Section 4 provides that "any such note, bill, bond, or other instrument in writing, made payable to any person or persons, shall be assignable by indorsement thereon, under the hand of such person and of his assignee, in the same manner as bills of exchange are, so as absolutely to transfer and vest the property thereof in each and every assignee successively."

Under this statute all promissory notes and instruments in writing for the payment of money are negotiable, whether so expressed or not. And whether the particular instrument contains the words "or order," or equivalent words, or not, its legal effect is the same as if it did contain such words. *Thackaray v. Hanson*, 1 Colo. 366;

Roosa v. Crist, 17 Ill. 450; *Archer v. Claflin*, 31 Ill. 306. To constitute a good promissory note, no precise words of contract are necessary, provided they amount, in legal effect, to a promise to pay. In other words, if over and above the mere acknowledgment of the debt there may be collected from the words used a promise to pay it, the instrument may be regarded as a promissory note. 1 Daniel, Neg. Inst. § 36 *et seq.*; Byles, Bills, 10, 11, and cases cited. See, also, the following decisions under statutory provisions similar to our own: *Bilderback v. Burlingame*, 27 Ill. 338; *Archer v. Claflin*, 31 Ill. 306; *Jacquin v. Warren*, 40 Ill. 459; *White v. Smith*, 77 Ill. 351; *Petillon v. Lorden*, 86 Ill. 361; *Stacker v. Watson*, 1 Scam. 207; *Smith v. Bridges*, Breese, 18; *Williams v. Forbes*, 47 Ill. 148; *Sappington v. Pulliam*, 3 Scam. 385; *Roosa v. Crist*, 17 Ill. 450; *Wilder v. De Wolf*, 24 Ill. 190.

"Due A. B. \$325, payable on demand," or, "I acknowledge myself to be indebted to A. in \$109, to be paid on demand for value received," or, "I. O. U. \$85 to be paid May 5th," are held to be promissory notes, significance being given to words of payment as indicating a promise to pay. 1 Daniel, Neg. Inst. § 39, and cases cited.

Hallack's itemized account with Garvey, upon which the undertaking of the defendant is indorsed, is in no sense negotiable paper. The indorsement thereon, however, signed by the defendant, is a new undertaking; and if, under our statutes, it is negotiable, it imports a consideration. *Bay v. Freazer*, 1 Bay, 72. The word "accepted" on a bill of exchange is an engagement to pay the bill in money when due. Indorsed upon non-negotiable paper, as in this case, there is authority for saying that it would not import a consideration as in the case of such indorsement upon negotiable paper, and a consideration would have to be alleged and proved. Byles, Bills, 3, note; *Jeffries v. Hager*, 18 Mo. 272; *Rich-*

ardson v. Carpenter, 2 Sweeny, 366. The language of the undertaking, however, must be considered as a whole, and in this case we think it clearly imports a promise upon the part of the defendant Cowan to pay Hallack, the payee, the amount of the bill upon which it is indorsed, at the time specified. 1 Daniel, Neg. Inst. § 36 *et seq.*, and cases cited.

We think the writing comes clearly within the provisions of the statute which we have quoted; that is to say, it is "an instrument in writing" made by the defendant Cowan, whereby he promises to pay in money, at a specified date absolute, the amount of the bill upon which the undertaking is indorsed. As such it is a negotiable instrument, and imports a consideration. Our statute in this respect is substantially the statute of 3 and 4 Anne, chapter 9 (1 Daniel, Neg. Inst. § 5, note; *id.* § 162), the effect of which was, in an action upon a promissory note, to dispense with the necessity of either alleging or proving a consideration. *Peasley v. Boatwright*, 2 Leigh, 198. In this view, the plaintiff was entitled to recover on the evidence introduced, and the defendant's motion for a nonsuit was properly overruled.

It is claimed that the court erred in sustaining the demurrer to the third defense. The language of the writing sued upon is in some respects unusual; but we see no serious difficulty in declaring its meaning. While the word "specification" is of no special use in the sentence where it occurs, it is harmless. The contract is complete without it, and its import is the same with it. It does not appear to have been used to qualify or modify the undertaking, but to amplify by repetition, and is to be treated as tautology. The acceptance being unconditional, it was not competent for the defendant to show that it was upon condition. If it was in fact conditional, and, as the defendant alleges, dependent upon the contingency of Garvey's complying with the terms of his contract with the defendant, it should have been so written. It follows

that the third defense is bad. It proposes to contradict and vary the terms of an express contract. The demurrer to it was properly sustained.

The judgment of the court below must be affirmed.

Affirmed.

GUMM V. METZ ET AL.

Where the bill of exceptions on appeal from the county court is merely a statement of the proceedings, not signed by the county judge, it does not form a part of the record, and cannot be considered.

Error to County Court of El Paso County.

Mr. IANTHUS BENTLEY, for plaintiff in error.

Mr. J. L. WILLIAMS, for defendants in error.

BECK, C. J. The plaintiff in error brought an action against the defendants in error, before a justice of the peace of El Paso county, in February, 1883, laying her damages at \$75. Upon the trial she recovered judgment against the defendants for the sum of \$15 and costs of suit. Defendants thereupon appealed to the county court. A trial was had in the month of March following, before the county judge, a jury being waived, who rendered judgment in favor of the defendants for the sum of \$1 and costs of suit. The plaintiff has brought the cause here by writ of error, and has assigned sundry errors alleged to have been committed by the court below in the rendition of said judgment, none of which we are able to review upon the record presented, for the following reasons:

1. We cannot review the cause upon the testimony, for the reason that what purports to be a bill of exceptions is merely a statement of the proceedings as pre-

pared by the plaintiff's counsel. It is not signed by the county judge, and does not even appear to have been presented to him for his signature. No one appears to have had anything to do with it but the plaintiff's attorney. It therefore forms no part of the record and cannot be considered.

2. The cause having been originally commenced before a justice of the peace, there are no written pleadings from which we might learn the nature of the issues presented for trial. Neither is there any statement of the nature of the injury for which damages were claimed by the plaintiff, either in the transcript sent up by the justice to the county court, or in the transcript of proceedings had in the latter court. The transcript from the justice's court shows the cause to have been docketed "in *assumpsit* for trespass. Damages demanded, \$75." Following this entry is the statement: "The plaintiff claims of the above named defendants the sum of \$75 for damages."

No error appearing of record affording ground for the reversal of the judgment, it will be affirmed.

Affirmed.

CHADBOURNE V. DAVIS.

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3a	270

1. Where evidence is very conflicting, contradictory and unsatisfactory, only the court in whose presence it is given can correctly estimate its value. An appellate court cannot.
2. Where two persons enter into a contract, the one to prospect for the discovery of mining claims, and the other to furnish the necessary money, provisions, etc., and do the discovery work on claims found, attend to the surveys, sink shafts, and file certificates of location, etc., such a contract, having been partly performed on both sides, cannot be regarded as rescinded, unless the circumstances show an absolute abandonment of the contract as to future enterprises. Proof of negotiations for an abandonment is insufficient to establish a rescission. The parties cannot treat the contract as binding and rescinded at the same time.

Appeal from District Court of Chaffee County.

THIS action grows out of an oral contract entered into by and between the plaintiff Chadbourne, and the defendant Davis, early in the month of June, 1881, by the terms of which Davis agreed to prospect for the discovery of mines during the summer season, and to locate his discoveries in the joint names of himself and Chadbourne; each to be the owner of an undivided half interest therein. In consideration of the services of Davis in the above capacity, Chadbourne agreed to furnish all necessary provisions, cash and transportation necessary for prospecting. The plaintiff alleges full compliance with the terms of his contract; but alleges that while defendant was prospecting, using plaintiff's provisions, tools, etc., to wit, about August 6, 1881, he discovered the Madaline lode, in Gunnison county, which he caused to be staked and recorded in the names of defendant and one Linehan, three-fourths thereof in the name of defendant, and one-fourth in the name of Linehan, and refuses to recognize the one-half interest therein justly owned by the plaintiff. The defendant admits the contract substantially as stated, except that he alleges that plaintiff further agreed to do the discovery work on claims discovered, sink shafts, have them surveyed, and certificates of location filed as required by law. He further alleges that he had discovered, up to August 1st, about nineteen claims, but plaintiff failed to comply with his agreement to improve, survey and record them, and permitted them to lapse. Defendant also alleges that the contract was rescinded about August 1, 1881, and the defendant discharged; that he subsequently, on the 6th day of August, 1881, discovered the Madaline, and that plaintiff was not and is not interested therein. The plaintiff replies, denying the rescinding of the contract, and alleging performance of his agreement, including assistance to complete the discovery work on the Mada-

line. The trial was to the court without a jury, and the finding and judgment were for the defendant Davis.

Messrs. HARTENSTEIN and SINDLINGER, for appellant.

Messrs. RHETT and HOBSON and ROGERS and CUTHBERT, for appellee.

BECK, C. J. The evidence throughout the case is very conflicting, contradictory and unsatisfactory. A court can only correctly estimate such testimony when given in its presence. We are of opinion that the evidence is sufficient to sustain the rescission of the contract as to further prospecting for mines after August 1, 1881. Several witnesses testify to it, and the testimony of the plaintiff is not in plain contradiction. He admits saying more claims had been discovered up to that date than could be worked; also that he told Davis he could not afford to work on every mineral streak he might discover, and other admissions of like import. The defendant, five or six days afterwards, discovered the Madaline; and it is claimed their joint conduct concerning the discovery work, and their joint efforts to sell the claim, have an important bearing on the question whether it was discovered while the prospecting contract was still recognized by the parties as in force, or afterwards.

The rule concerning the rescinding of such an agreement is that, unless the circumstances show an absolute abandonment of the contract as to future enterprises, proof of negotiations for an abandonment is insufficient to establish a rescission of the agreement. The parties cannot treat the contract as binding and rescinded at the same time. But, when the entire testimony is considered, we are disposed to believe the finding of the court was correct, and that the contract was in fact rescinded. After the supposed rescission, which occurred at the village of Vicksburg, Chadbourne and Davis set out for Texas creek, where the Mountain View and Madaline

claims are situated. As they were ascending the hill, Chadbourne says they sat down, and he asked Davis what he was going to do. He says Davis had procured stuff (probably meaning provisions) from Daniel Mero, and, not knowing what he was going to do, he wanted to have an understanding. He admits that he knew, before starting out with Davis, that he had procured his supplies from Mero, and says the object of his inquiry was to find out what Davis was going to do. This would indicate that they had not set out with an understanding to continue operations under their prospecting contract.

Chadbourne went to the mines to perform labor on the Mountain View, and he claims that Davis was assisting him in this work when he discovered the Madaline. This fact, if true, would not establish Chadbourne's interest in the Madaline. The Mountain View had been discovered while the contract was in force, and it would be consistent for the parties subsequently to perform necessary labor thereon to perfect the location. But the Madaline, discovered August 6th, would not come within the terms of an agreement already rescinded, and there is no evidence of any other agreement. The action of Davis, in staking the claim in his own name alone at the time of its discovery, tends to show his understanding that the contract had been dissolved. Chadbourne did not even go to see the new claim until his next return to the camp, about the 17th of August, when, according to his testimony, he brought a man with him to buy this claim. He testifies that he assisted in performing the location work thereon; but his own testimony on this point is, to say the least, unsatisfactory, as it shows he remained in the camp a very short time during that visit. His strongest proof of a recognized interest in the claim is the testimony of Van Winkle, a witness introduced by him in rebuttal. This was the person whom Chadbourne claims to have taken over to buy this valuable mine. It seems to us, however, that the testimony of this witness

is not in keeping with his assumed character as a purchaser of mines. Being sworn, and asked what his business was, he answered: "I prospect a little once in a while." Being asked what he went to Texas creek for on the 16th or 17th of August, 1881, he answered that Chadbourne wanted him to go over and "take some interests and sink some assessments. * * * He showed me different claims after I got there and some ore, and wanted to know what I would give for some claims. One in particular was the Madaline, as he called it." Witness further states that, after some negotiation, Chadbourne and Davis each agreed to take \$1,500 for their respective interests therein; that they were then performing the location work on the claim. The stakes were set, and contained the name "Madaline;" but he remembers nothing more of the inscription. This witness admits that he could not purchase a \$3,000 claim, but winds up by saying that the parties offered him \$50 each to find a purchaser. This evidence, when considered by itself, and also in connection with that given by B. F. Whitescarver and wife, who both swore positively that Chadbourne tried to hire the husband to testify for him in this case, is so unsatisfactory that we decline to disturb the finding of the district court, before whom the witnesses personally appeared.

The judgment will be affirmed.

Affirmed.

WILSON V. GERHARDT.

1. Errors in admitting oral testimony to vary a written instrument will not be noticed on appeal, unless the evidence is sent up with the record.
2. A release is not to be implied from the mere fact of assent to the assignment of a lease, and the assignment of a lease does not annul the lessee's obligation on his express covenants to pay rent, even though the lessor has accepted the assignee as his tenant, and collected rent from him.

Error to County Court of Clear Creek County.

ON June 12, 1882, at Idaho Springs, Colorado, the plaintiff, Henry Wilson, leased to Charles Gerhardt and A. J. Voight, as Gerhardt & Voight, certain premises there situate, for the term of three years, at the monthly rental of \$30 per month, payable in advance, the lease containing the usual covenants for the payment of rent, etc. In September, 1882, Gerhardt withdrew from the business, and assigned his interest in the lease to Voight, which assignment was assented to by the lessor, and Voight continued for some time in possession. Thereafter Voight made default in payment of the rent due October 1, 1882, and November 1, 1882. Plaintiff brought suit against him for the rent for said months, and obtained judgment thereon. Plaintiff then brought this suit against Gerhardt & Voight on their covenants in the lease for the rent due for December and January. Defendant Gerhardt answered for himself, Voight having absconded. The defense relied upon was that by virtue of the assignment by Gerhardt to Voight, and its acceptance by the lessor, Gerhardt, the assignor, was released from all liability thereunder. Judgment was rendered below for the defendant.

Mr. T. B. BRYAN and Mr. Geo. M. DUNN, for plaintiff in error.

Mr. T. J. CANTLON and Mr. J. C. FITNAM, for defendant in error.

ELBERT, J. We cannot notice the alleged error touching the admission of oral testimony affecting the terms of the lease or the assignment, as the evidence is not preserved in the bill of exceptions. It appears, however, that the court below regarded the written assent of the plaintiff to the assignment of the lease by the defendant Gerhardt as discharging him from his liability to pay

rent in accordance with his covenants in the lease, and judgment was rendered for the defendant upon this view of the law. This was error. There is no such intention expressed in the writing, and a release is not to be implied from the mere fact of assent to the assignment. A lessee who assigns his lease does not thereby discharge himself of his obligation under it. He remains liable upon his express covenants to pay rent in an action by the lessor, even if the lessor has accepted the assignee as his tenant, and collected rent from him. Tayl. Landl. & Ten. § 438; Wood, Landl. & Ten. §§ 305, 350; 1 Washb. Real Prop. *326.

The judgment of the court below must be reversed and the cause remanded.

Reversed.

ASSIG V. PEARSONS.

Plaintiff obtained judgment against defendant in a justice's court on two promissory notes. The case was appealed to the county court, and defendant asked leave to file his affidavit denying the genuineness of the signatures to the notes, which defense he did not make before the justice. The county court denied the application and refused to consider the affidavit as a paper in the case. *Held* error, as there are no pleadings in cases appealed from justices of the peace, and the affidavit properly raised the issue of the genuineness of the signatures.

Appeal from County Court of Lake County.

PEARSONS recovered judgment against Assig, before a justice of the peace, on two checks of \$50 each, purporting to be signed by Assig. On appeal to the county court, Assig asked leave to file his affidavit in the case denying that the signature to the checks sued upon was his signature and alleging that the same were forgeries. The court refused to receive or consider the affidavit, on the ground that it had not been filed on the trial be-

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fore the justice of the peace, and judgment was rendered for the plaintiff. Assig appeals to this court.

Messrs. GEORGE and PHELPS, for appellant, *ex parte*.

ELBERT, J. Before or at the time the case was called for trial in the court below, the defendant Assig asked leave to file his affidavit denying that the signature to the checks sued upon was his signature. The refusal of the court to permit the defendant to file this affidavit, and to consider it as a proper paper in the case, was error. Whether such affidavit or a similar affidavit had been filed on the trial before the justice was immaterial. Section 1949, Gen. St., provides that "no party to any suit before a justice of the peace shall be permitted to deny his or her signature to any written instrument upon which such suit shall be founded, or which shall be offered as a set-off or acquittance for the debt demanded in such suit, unless the said denial be under the oath of the party so denying the signature purporting to be his or her own." Section 1987, Gen. St., provides that, upon appeals from justices to the county court, the appellate court shall hear and determine the cause in a summary way, according to the justice of the case, without pleading in writing. Section 1989 provides that the rights of the parties shall be the same as in original actions.

Undoubtedly, in an original action brought in the county court, "the genuineness and due execution" of the instrument sued upon could have been put in issue by a verified answer. Section 66, Amended Code. As there were no pleadings in the case, and as it was the duty of the appellate court, under the section which we have quoted, to hear and determine the cause in a summary way, without pleading in writing, the affidavit of the defendant denying his signature should have been received as raising this issue, and as putting the plaintiff to proof of the signature of the defendant. If the issue

was not presented on the trial before the justice, it might have afforded grounds for a postponement of the trial to avoid surprise to the other party; but it was not a ground for rejecting the affidavit.

The judgment of the court below is reversed and the cause remanded.

Reversed.

BECKER V. PUGH ET AL.

1. Before either party can recover in an "adverse" mining suit, he must show a compliance with the statutes, state and federal, and local miners' rules and regulations relating to the *location* of mining claims. Proof of occupancy merely will not suffice.
2. The miners' regulations of Gregory district, adopted in 1860, required the locator to indicate by stakes or otherwise upon the surface, the ground or the vein sought to be appropriated.
3. An action in the nature of ejectment is proper in support of an adverse filed in the land office. But the ordinary rules in ejectment are somewhat modified.
4. Under the code, a party is entitled to such relief as his evidence, together with the facts averred in the body of his pleading, justify, regardless of the relief demanded in his prayer.

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10	314
11	455
9	589
12	350
9	589
13	108
9	589
14	454
14	456
9	589
17	243
9	589
1a	384
9	589
20	373
9	589
22	443
9	589
37	28

Appeal from District Court of Gilpin County.

Mr. L. C. ROCKWELL, for appellant.

Messrs. TELLER and ORAHOD, for appellees.

HELM, J. This action was brought by appellees to support an adverse filed in the United States land office. The decree or judgment was rendered in 1882. At that time, therefore, the act of congress of March 3, 1881, was in force. This act reads as follows: "Be it enacted," etc., "that if, in any action brought in pursuance of section 2326 of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered accord-

ing to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office, or be entitled to a patent for the ground in controversy, until he shall have perfected his title."

It will be observed that, until plaintiff below established *title to the ground in controversy*, he could not recover a verdict or judgment. And this remark is equally true of defendant below, who was the applicant for patent. Thus, it becomes important to ascertain the meaning of the statutory phrase, "title to the ground in controversy." A more specific statement of the exact question presented would be: Can a recovery, in actions brought to support adverse proceedings, be maintained by proof of occupancy merely of the premises in dispute; or must either party, before he can secure judgment, show a compliance with the statutes, state and federal, and also miners' rules and regulations in force, relating to the *location* of mining claims upon the public domain?

A careful examination of sections 2322, 2324, 2325, R. S. U. S., in connection with other provisions in the act of congress on the subject of lode claims, leads us to adopt the second of the foregoing views. A fair construction of the provisions referred to is that the applicant for patent must show a compliance with the location statutes, rules and regulations aforesaid. This view is taken by the United States land office. Section 31 of the land office rules, revised and published in 1881, reads as follows: "Attached to the field-notes so filed must be the sworn statement of the claimant that he has the possessory right to the premises therein described, in virtue of a compliance by himself (and by his grantors, if he claims by purchase) with the mining rules, regulations and customs of the mining district, state or territory in which the claim lies, and with the mining laws of congress; such sworn statement to narrate briefly, but as clearly as possible, the facts constituting such compli-

ance, the origin of his possession, and the basis of his claim to a patent." Section 32 of the land office rules commands the applicant, in all cases where the mining records are not destroyed by fire or otherwise lost, to file a true and correct copy of his certificate, as shown on the records, attested by the seal of the recorder, or if he have no seal, by his oath. Section 48, relating to the notice filed in the land office by the adverse claimant, requires a statement under oath concerning his location record similar to that provided in section 32 for the applicant.

These and other land office rules clearly show the construction given by the executive department of the general government to the statutes in question.

This view is supported by considerations both of propriety and justice. The citizen is allowed the privilege by the federal government of appropriating a lode or vein which he discovers upon the public domain and of securing the exclusive possession thereof prior to patent. It is very seldom, in the nature of things, that he can actually possess and occupy the full one thousand five hundred feet of the vein allowed him, to say nothing of the additional surface ground which he is permitted to take. Location statutes, rules and regulations are framed for the purpose of enabling him to hold, prior to patent, constructive possession, as against all other persons, of that part of the vein or veins and surface ground which he cannot and does not actually hold *in pedis possessio*. By compliance with the statutes and regulations, and by such compliance alone, can he prevent other miners and prospectors from appropriating those portions of his claim of which he is not in the actual occupancy. *Armstrong v. Lower*, 6 Colo. 582. It is eminently proper that before he shall be permitted to procure from the government a title in fee-simple to the ground which he professes to hold and has held by such constructive possession, he should be required to show his good faith by proving compliance with the statutes and regu-

lations through which alone the constructive possession is given.

Authorities other than the federal statutes themselves need scarcely be cited to establish the proposition that, in order to constitute a valid location, compliance with miners' rules and regulations in force at the time, as well as with statutes on the subject, is essential; but counsel are cited to *Sullivan v. Hense*, 2 Colo. 424, and *Consolidated Republican Mountain Min. Co. v. Lebanon Min. Co. ante*, p. 343.

It was necessary for plaintiffs in this case to establish a compliance with the miners' rules and regulations in force at the time the claims described in the complaint were located. These claims were in Gregory mining district. In 1860 the citizens of Gregory district, "in convention assembled," adopted "An act defining claims, and regulating the title thereto." This act was offered in evidence, and is before us. It was applicable to the locations of plaintiffs. Among other things, it required the locators of lode claims to post stakes, or otherwise indicate upon the surface, the ground or the vein appropriated. Section 6 thereof reads as follows: "Be it further enacted that any claim or claims now held, either by purchase or discovery, if abandoned for ten consecutive days *after being staked off*, shall be forfeited to any person or persons who may take up the same, and work them, and not abandon them as aforesaid." Section 7: "Be it further enacted that no claim shall be regarded as good and valid unless *staked off* with the owner's name, giving the direction, length, width, and date when the same was made; and, when held by a company, the name of each member shall conspicuously appear."

The phrase "staked off," occurring in both of these regulations, evidently refers to marking the boundaries of claims by stakes, or at least to the posting of stakes along the vein or its croppings, so as to indicate to other prospectors the ground intended to be appropriated. It

is hardly possible that this phrase, as thus used, could mean simply the erection of a single stake, containing a notice somewhat similar to that required upon what is now denominated the "discovery stake." But we need not determine exactly what sort of stakes were meant, or the number thereof; for there is in the record before us, from first to last, no proof of any kind whatever concerning the erection of a stake or stakes anywhere upon the claims; nor is there any evidence to show that the boundaries or the vein were in any other way designated. Therefore we must hold that no sufficient location by plaintiffs was proven, and that, under the views above announced, they were not entitled to recover. If, in the opinion of the court, defendants also failed to establish a valid location, the finding in this case should have been that "title to the ground in controversy" was not shown by either party, and judgment should have been entered accordingly.

In view of future proceedings, it is necessary for us to consider another question discussed by counsel. To support an adverse filed under section 2326, R. S. U. S., an action in the nature of ejectment is undoubtedly proper. Some of the rules pertaining to ejectment are, however, modified in the trial of such causes. For instance, no proof by plaintiff of an actual ouster is necessary; and, upon proper showing otherwise, the action may be maintained, even though plaintiff be himself in the actual possession and occupancy of the disputed premises, or even if the premises at the time the suit is commenced be not in the actual possession of any person. *Morr. Min. Rights*, 184, and cases.

The complaint in the case at bar is defective, and was obnoxious to demurrer. But defendant waived this objection, and filed his answer. Moreover, when plaintiffs asked leave to amend the complaint so as to cure these defects, defendant objected, and upon his objection the application was denied. While this complaint seems to

have been framed upon a mistaken theory in one respect, it yet shows clearly the cause of action which the pleader intended to state. No one can read it and not arrive at the conclusion that the suit was brought under an adverse filed to contest defendant's application for patent to the premises in controversy, and that the purpose of the pleader was to put in issue and try the questions which by section 2326, R. S. U. S., are submitted to courts for adjudication. The amendment sought by plaintiffs, had it been permitted, would not have changed the cause of action. It would simply have produced a more specific statement of the nature of the claim or interest asserted by them. Under the practice in this state, a party is entitled to such relief as his evidence, together with the facts averred in the body of his pleadings, justify. The prayer of a complaint, or the relief demanded therein, is not conclusive as to the nature or extent of the recovery. *Kayser v. Maugham*, 8 Colo. 232; Bliss, Code Pl. § 161.

The fact that plaintiffs asked for a decree, and not for a judgment, therefore, is of no significance. The body of the complaint showed that the actual relief desired was legal in its nature.

Should the cause be retried, plaintiffs may have leave to amend their complaint, if they shall be so advised.

The judgment is reversed.

Reversed.

FIRST NAT. BANK OF LEADVILLE V. LEPPLE ET AL.

1. This court will not review a judgment appealed from on the evidence unless the bill of exceptions contains all the evidence.
2. A bank with which a note is deposited by the payee, for collection, cannot refuse to return the note, or its proceeds, to the depositor, on the ground that it was given to defraud creditors of a third person, unless the bank itself is one of those creditors.

8. To hold a bank with which a note is deposited, for collection, as garnishee, with respect to said note, a special notice is necessary, specifying the note in question as the property of a person other than the depositor.

Error to District Court of Lake County.

THE complaint alleges that on June 27, 1879, M. Leppel & Co. were a firm; that the First National Bank of Leadville was a corporation,— both doing business in Leadville; that on June 27, 1879, plaintiffs deposited in defendant's bank, for collection, a promissory note, executed by F. W. Clark to Isidore Heller, and by him indorsed to M. Leppel & Co., which note was for the sum of \$400, payable thirty days from date; that at and after the maturity of said note plaintiffs demanded from defendant said note, or the proceeds thereof, but defendant refused, and still refuses, to deliver said note or proceeds, and has converted the same to its own use. Prayer for judgment for \$400, with interest at ten per cent. per annum from maturity of note, and costs.

The answer admits that the defendant is a corporation, as named in complaint; denies that plaintiffs on June 27, 1879, or at any other time, deposited with defendant, for collection, the note mentioned in complaint; denies that demand was ever made for said note or proceeds, or that defendant refused to deliver the same to plaintiffs, or the proceeds thereof; denies that defendant has converted said note or proceeds to its own use. For further answer defendant alleges that said note is not the property of plaintiffs, but avers said note is really the property of David Heller; that said note was payable to Isidore Heller as part pay for the sale of the Washburn lode claim; that David Heller owned the interest of said Washburn lode for which this note was given, and caused the note to be given to Isidore Heller, his son, for the purpose of defrauding the creditors of said David Heller; that M. Leppel knew well this fraud at the time of and

before the assignment of this note; that a case is now pending in the district court for the fourth judicial district, where John W. Zollars is plaintiff, and David Heller and others are defendants; and, among other things, this case seeks to subject this note to the payment of a debt due by David Heller to John W. Zollars. Defendant asks judgment for its costs.

The amended answer alleges all the matters set up in answer, and also that note was tendered to plaintiffs; that plaintiffs were parties to, and cognizant of, the fraud alleged to have been committed by the Hellers; that defendant had been garnished and commanded to hold said note, or proceeds thereof, to satisfy any judgment which may be given in a case pending in said district court, wherein John W. Zollars is plaintiff, and David Heller and Cohn are defendants; that Clark, the maker of said note, was insolvent, and said note is therefore valueless.

Trial to the court. Judgment for plaintiffs for \$516 and costs. Writ of error to the supreme court.

MESSRS. MARKHAM, PATTERSON and THOMAS and J. F. FRUEAUFF, for plaintiff in error.

MESSRS. HARMON and COVER, for defendants in error.

ELBERT, J. It does not appear that the bill of exceptions in this case contains all the evidence that was admitted on the trial in the court below. We cannot, therefore, review the judgment on the evidence. It is proper for us to say, however, that, from the evidence before us, there does not appear to have been much merit in the defense interposed by the defendant corporation. If the note in question was made payable to Isidore Heller, and indorsed by him to the plaintiffs, with intent to defraud the creditors of David Heller, as alleged, it did not concern the defendant corporation, unless it was a creditor of David Heller.

Nor does it appear that the defendant corporation was in anywise charged with liability in respect of the note in question by the garnishee proceedings in the case of *Zollars v. David Heller et al.* The note was executed by Clark to Isidore Heller, and by him assigned to the plaintiffs, who deposited it with the defendant for collection. David Heller, the defendant in the attachment suit, had no apparent connection with, or ownership of, it. Under these circumstances, if the note was in fact the property of David Heller, and if it could be reached at all by garnishment, in order to charge the defendant, a special notice was requisite, specifying the note in question as the property of David Heller, the defendant in the attachment suit. The general notice of garnishment required by the statute (and none other appears to have been served) would not require the garnishee to hold the property of third persons as subject to the levy. It does not appear that the proceedings against the defendant corporation as garnishee were ever pursued to judgment. The judgment of the court below is affirmed.

Affirmed.

CHIVINGTON V. THE COLORADO SPRINGS CO.

1. Under the Civil Code no default can be entered for want of answer while a motion to quash the return upon the summons is pending and undetermined.
2. It is not error to require payment of the penalty adjudged upon overruling a demurrer or motion, under section 57 of the code, as a condition precedent to pleading over.
3. The statute of limitations is a good defense in ejectment, but under the present practice it must be specially pleaded in this as in other actions, or the defense is waived.
4. When plaintiff has legally parted with his title and right to occupy, he cannot recover in ejectment, even though defendant's paper title be fatally defective.
5. If a grantor duly acknowledges an instrument conveying land, and authorizes its delivery, he cannot afterwards avoid the same on the ground that his signature thereto was forged.

9	597
10	283
10	408
9	597
12	389
9	597
13	555
9	597
15	375
9	597
19	563
9	597
20	201
9	597
21	86
9	597
13a	447
9	597
233	292

6. The certificate of the acknowledging officer may, in some cases, be impeached for fraud, duress or gross concurrent mistake, but the proof must be clear, strong, convincing, and by disinterested witnesses.
7. When the evidence is such that it would be the court's unquestioned duty to set aside a verdict for plaintiff, should one be returned, a verdict for defendant may be directed.

Appeal from District Court of Pueblo County.

THIS was an action of ejectment.

The complaint was as follows:

"For that the said plaintiff, on the 1st day of December, A. D. 1865, was possessed of a certain parcel of land with the appurtenances, lying in the county of El Paso, in the state of Colorado, and described as follows, to wit: the north half of the southwest quarter of section 5, township 14 south, range 67 west, of which said lands and tenements the plaintiff is seized in fee by and through divers mesne conveyances from the government of the United States to plaintiff, and the plaintiff being so thereof possessed, the defendant afterwards, to wit, on the 1st day of August, A. D. 1882, unlawfully entered upon said premises and ousted said plaintiff therefrom, and thence hitherto and now wrongfully withholds from the plaintiff certain portions and parcels thereof, that is to say, lots 24, 28, 29 and 26, in block "A," and lots 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19 and 20, and south one-half of lot 21 in block "B," and lots 1, 2, 3, 4, 5, 7, 8, 14, 16, 20, 22, 13½, 14½, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35, block "D," and lots 8 and 29, block "C," west thirty-eight feet lot 4, block "F," within the said north half of the southwest quarter of section 5, township 14 south, range 67 west, and in what is now known as Manitou, in the county and state aforesaid; which said wrongful ouster and wrongful withholding of said premises by the defendant was and is to the damage of the plaintiff in \$5,000, and of which said pieces and parcels of land, and each of them, the plaintiff is entitled to the

immediate possession. Wherefore plaintiff prays judgment for the possession of the said several lots and parcels of land; also for the sum of \$5,000 for the wrongful ouster and detention thereof, and for costs of suit."

To which the defendant answered as follows:

"Denies that the plaintiff is seized in fee or otherwise of the premises described in said complaint, and in controversy in this action, or any part thereof, or has or had, at the time of the commencement of this action, any right, title, interest, estate, claim or color of claim thereto, either in law or equity, by or through the United States, or from any other source whatsoever.

"Denies that the defendant unlawfully entered upon the premises in controversy on the 1st day of August, 1882, or at any other time, and denies that it ever ousted the plaintiff therefrom.

"Denies that the plaintiff has been or is damaged in the sum of \$5,000, or in any other sum, by reason of any act or thing had or done by the defendant in or about the possession, use, occupation or detention of the premises in controversy; or that plaintiff is damaged at all by reason of any matter or thing alleged in said complaint.

"Denies that the plaintiff is entitled to the possession, immediately or otherwise, of the said premises, or any part or parcel thereof.

"And for another and separate defense to the cause of action set out in plaintiff's complaint the defendant alleges that, at the time of the commencement of this action, it was and is seized in fee-simple and in the possession, and entitled to the possession, of all and singular the lots and parcels of land mentioned and described in the complaint, and sought to be recovered in this action, without any right or title thereto being vested in the plaintiff.

"And for another and separate defense to this action defendant alleges that, for a period of more than five successive years immediately preceding the commence-

ment of this action, the defendant was in and enjoyed the peaceable, undisputed and continuous possession of all and singular the lots and parcels of land described in the complaint and in controversy in this action, and that said possession, during the whole of said period, was held by the defendant under claim by and color of title in it to said premises in fee-simple, and that such claim and color of title was had, made and held by defendant in good faith at all times. That during the whole of the time that the defendant was so in possession of said premises, under said claim and color of title, the defendants duly paid and caused to be paid all taxes legally assessed upon and against said lots and parcels of land as and for its property in fee by virtue of said color of title, whereby and by force of the statute in such case made and provided the defendant is held and deemed to be seized in fee of said premises and entitled to have and retain the possession thereof.

“And for a further and separate defense to this action defendant alleges that, for and during a period of more than five successive years immediately preceding the commencement of this action, the defendant, in good faith, continuously claimed to be the owner in fee-simple and at all times entitled to the possession of all and singular the premises described in the complaint and in controversy herein, and that such claim was at all times made by defendant under color of title by deed purporting to convey to and vest in the defendant an estate in fee-simple in and to the whole of said premises. That during the whole of the period aforesaid the said premises continued vacant and unoccupied, and the said claim of defendant remained undisputed; and, further, that during the whole of said period aforementioned the defendant duly paid and caused to be paid all taxes legally assessed upon and against said premises, and that such payment was made and continued to be made by defendant under the *bona fide* belief that it was the owner of

said premises in fee-simple under and by virtue of said color of title, and that during said time no other person or persons whomsoever paid any taxes upon said premises either for the whole of said term or any part thereof, whereby and by force of the statute in such case made and provided the defendant is held and deemed to be seized in fee of said premises, and in law is entitled to the full and exclusive possession thereof."

The defendant demurred to the first "separate" defense and moved to strike out the second and third separate defenses. The demurrer and motion were overruled. The plaintiff excepted to the ruling of the court on the motion and replied, specifically traversing the separate defenses.

Upon the conclusion of the evidence the court instructed the jury as follows:

"The jury is hereby instructed that under the evidence adduced upon the trial of this cause, and the questions of law determined by the court, your verdict herein must be for the defendant.

"The form of your verdict may be as follows: We, the jury, upon the issues joined herein, find for the defendant."

To which the plaintiff excepted. Thereupon the jury returned a verdict in favor of the defendant, upon which judgment was rendered. To reverse said judgment the plaintiff appealed to this court.

Among the errors assigned in this court were the rulings of the district court in refusing to strike out the second and third separate defenses, and upon the instruction of the court directing a verdict for the defendant. No plea or defense of innocent purchaser for value without notice was interposed by the defendant.

Mr. L. B. FRANCE, for appellant.

Messrs. WALDRON and BENEDICT and PHELPS, for appellee.

HELM, J. The court committed no error in refusing a default for want of answer. Within the period allowed for pleading, defendant filed its motion to quash the sheriff's return to the summons, and when the application for default was submitted, this motion was still pending. Section 149 of the Civil Code must be construed in connection with the provisions of that instrument that relate to the time of answering. Under this section, as amended in 1881, no default could be entered while the motion to quash remained undetermined.

We shall decline to reverse the judgment because the court required plaintiff, before filing his replication, to pay the \$10 previously awarded to defendant. The judgment for that sum was entered against plaintiff under section 57 of the code, upon the denial of his demurrer and motion. With the alleged unreasonableness of this statute we have nothing to do. It was framed upon the theory of compensation to the successful party, for extra and unnecessary expense occasioned by the demurrer or motion overruled, and is, in this respect, analogous to laws providing for the recovery of costs. It may also have been intended to secure greater caution by parties and counsel, and to prevent the filing of sham and frivolous pleadings of the kind mentioned. We are not prepared to hold the statute unconstitutional, and it clearly warranted the ruling in question.

Nor did the court err in denying plaintiff's motion to strike from the answer, as "immaterial, irrelevant and redundant," certain defenses therein averred. Chapter 27 of the Revised Statutes, on the subject of ejectment, was repealed in 1877, and the "general issue" no longer performs the office therein assigned to it. Chapter 23 of the code applies to this class of actions the general rules of pleading specified elsewhere in that instrument; besides, it expressly allows defendant to set up affirmatively the character of the estate, or right of possession or occupancy through which he claims. Section 2189 of the

General Statutes, referring to the limitation of actions, prescribes a rule of pleading. It was originally framed with reference to the existing law which inhibited in ejectment all pleas save the "general issue only." It did not then, nor does it now, preclude the defendant in ejectment from availing himself of this defense. But, as a rule of pleading, it is modified by the subsequent provisions of the code above mentioned. Under the present practice, the statute of limitations must be specially pleaded in this as well as other actions, or the defense will be considered waived.

For the purposes of this case, it is a matter of no importance whether the defendant company and its immediate grantors were, at the time of the conveyances to them, capable of taking title to real estate in Colorado. There were intermediate deeds between them and plaintiff to other parties whose capacity in this respect is not questioned. The action is in the nature of ejectment, and, except as modified by statute, the common law principles pertaining to ejectment are applicable. Neither mines nor mining claims are in controversy, and the verdict must be for defendant unless plaintiff makes out a case; moreover, the latter must recover, if at all, upon the strength of his own title or right to possess and occupy; if he has legally parted with both he cannot maintain the action, even though defendant's paper title be fatally defective.

We proceed now to consider the main question presented, viz.: Did Chivington part with his title to the property by valid and binding conveyances?

He asserts that the power of attorney from himself to Pollock, offered in evidence, is a forgery. But when upon the witness stand he contented himself with the declaration that he did not *sign* the paper or authorize any one else to attach his name thereto. He did not fairly question the *bona fides* of his acknowledgment appended to the instrument, nor did he deny that he authorized the delivery thereof. It is strange, indeed, if in

truth the acknowledgment is also forged, and if no delivery was authorized by him, that when testifying he failed to specifically mention these two important matters. It is also a circumstance of sufficient significance to be noticed, that the notary public who made the certificate of acknowledgment, and who was present at the trial in the employ of plaintiff, was not called upon to offer any explanation touching the same. Testimony by him admitting that he made this certificate, but asserting that it was untrue, would be entitled to little consideration. *Wilson v. S. P. Com'rs*, 70 Ill. 46. But his sworn declaration that the certificate itself was a forgery might be very important.

Whether plaintiff actually *signed* or previously directed another to sign his name to the instrument may be a matter of no importance. Admitting for the purposes of the argument that his testimony in this regard is true, the power of attorney is still not necessarily void. If he duly acknowledged the instrument and authorized its delivery, he thereby recognized and adopted the signature and seal, making them his own for the purposes of the conveyance. *Clough v. Clough*, 73 Maine, 487; *Kerr v. Russell*, 69 Ill. 666.

We have not overlooked the fact that while giving his testimony plaintiff was asked when he first saw the power of attorney, and answered "Yesterday." This question and answer were preliminary to the statement that his signature was forged. The good faith of the certificate of acknowledgment was not spoken of; but if we assume that their effect is indirectly to challenge this certificate, and hence admit that plaintiff did, in this equivocal way, dispute its validity, he is yet in no better attitude, for "the unsupported testimony of a party to a deed, that he did not execute it, shall not prevail over the official certificate of the officer taking the acknowledgment." *Kerr v. Russell*, *supra*; *Lickmon v. Harding*, 65 Ill. 505.

While the certificate of the officer may in some cases

be impeached for fraud, duress, or gross concurrent mistake, the proof to sustain the charge "is required to be of the clearest and strongest, and of the most convincing character, and by disinterested witnesses." *Kerr v. Russell, supra; Baird v. Johnson*, 98 Ill. 78.

The reasons for these rules are obvious and satisfactory. They are essential to the security of titles. If the solemn deed of a party to real estate, duly attested by a public officer and recorded according to law, may be avoided by the grantor's individual oath or by anything short of clear and convincing evidence, the efficacy of recording statutes is largely destroyed, and the title to such property is precarious indeed. Public policy, as well as individual security, require that the ownership and peaceful possession of land should be subjected to no such hazard.

Let us illustrate the force of these conclusions by the case at bar. The instrument in question was regular in form, it was duly recorded, the certificate of acknowledgment complied with the law in all essential particulars, and there was absolutely nothing to advise parties dealing with the property of the alleged forgery. There is no claim or pretense that defendant is not an innocent purchaser for valuable consideration, without notice of any such defect. For sixteen years plaintiff paid no taxes, and neither exercised nor attempted to exercise any of the rights of ownership over the property. Ever since its purchase in 1872, defendant and parties holding title through defendant have been in undisputed possession, and have discharged the burden of taxation. Without one word of objection from plaintiff, they have been permitted to expend large sums of money in the erection of buildings, and placing of other permanent improvements upon the premises, such improvements comprising a large part of the town of Manitou. Under these circumstances, and at the end of the sixteen years, plaintiff returns to the state, and by his individual oath, substan-

tially unaided, undertakes to destroy the force and effect of an official certificate, and to undermine the apparently perfect title to this valuable property. The acknowledging officer, who is present and is friendly to plaintiff, is not called upon to say that the certificate is a forgery, while plaintiff himself avoids giving any direct evidence to this effect. The negative testimony of certain witnesses as to plaintiff's presence in Colorado, on the 1st of February, 1867, when the acknowledgment purports to have been taken, is entitled to but little weight. He himself admits that in November or December preceding he was here, but asserts that he then left and went to Cheyenne. Had the *bona fides* of the certificate in question been submitted to a jury upon all the evidence, with a proper instruction, and by them resolved for plaintiff, it would have been the court's unquestioned duty to vacate the special finding. Plaintiff failed, both in the *quantum* and kind of proof, to establish his charge of forgery. See *Kerr v. Russell*, *supra*, and cases cited; *Harkins v. Forsyth*, 11 Leigh (Va.), 294.

We do not rest our decision as to the power of attorney upon the rule cited, that "in favor of innocent purchasers for valuable consideration, without notice, it (the certificate of acknowledgment) is conclusive as to all matters which it is the duty of the acknowledging officer to certify, if he has jurisdiction." Whart. Ev. sec. 1052, and cases. Had plaintiff clearly and convincingly established the fact that both his signature and acknowledgment were forgeries, this rule would have no application, even though defendant is a purchaser of the kind described.

The deed to Palmer, executed by Pollock under the power of attorney above mentioned, which conveys eighty acres including the specific lots and parcels of land in the complaint referred to, is valid. Counsel for plaintiff asserts that the certificate of acknowledgment thereto attached is defective, but he makes no other or further reference to the subject in argument. We are

not advised of the particular defect upon which he relies. While this acknowledgment is somewhat informal, we think there is a substantial compliance with the statute of 1861, which was in force when the conveyance was executed.

It is our opinion that the title of plaintiff, and whatever possessory rights he held in the premises, passed to Palmer through these instruments. If this conclusion be correct, it follows that plaintiff could not recover.

The assignments of error relating to the admission of evidence and to the giving and refusing of instructions need not be considered. Appellant could in no way be prejudiced by the expert testimony concerning his signature; the matter being, by virtue of the law, as we have already seen, wholly immaterial. Under our views above expressed there was no necessity for submitting any question of fact to the jury, and the instruction to return a verdict for defendant was in order.

Plaintiff admits the due execution and delivery to Pollock, in 1867, of an absolute deed, referring to the identical eighty-acre tract above mentioned. This title, such as it was, also passed by deed to Palmer and through him to defendant. But plaintiff now undertakes to avoid the effect of this line of conveyances, on the ground that there was a patent ambiguity in the description, which renders inoperative the deeds to Pollock, and from Pollock as grantor to Palmer. Whether these deeds be valid, or, as plaintiff claims, void for uncertainty, is a matter we deem it unnecessary to discuss, for if valid, the title to the premises therein described passed to Palmer; and if void, a like result followed, as we have seen, through the power of attorney and deed from Pollock, as attorney in fact, to Palmer.

The foregoing conclusions being decisive of the case, we shall decline to lengthen this opinion by a discussion of the defense resting upon the statute of limitations.

The judgment is affirmed.

Affirmed.

MERCHANTS' BANK V. McCLELLAND.

9	608
14	306
9	608
1a	140
1a	417
1a	468
9	608
6a	221
9	608
8a	330
9	608
10a	35
10a	348
12a	480
9	608
15a	123
15a	124
15a	125
9	608
18a	106
18a	181
9	608
19a	189
9	608
24	141
20a	286

1. The cashier of an unincorporated bank, who is also a partner, and is alone authorized to transact all the business, and in whose name contracts are habitually made for the bank, may become by virtue of such a contract the trustee of an express trust, and under the code may sue thereon in his own name.
2. An antecedent debt may constitute good and sufficient consideration for the contract of assignment in connection with a negotiable instrument.
3. The rule that the assignee of a negotiable instrument for value in good faith before maturity may recover against the maker is not affected by the circumstance that such assignee is in possession of facts sufficient to arouse suspicion, and is negligent in not pursuing such information to discover the fraud or illegality to which the facts may seem to point.
4. The expression "due course of trade" is said to be when the holder has given for the note his money, goods or credit at the time of receiving it, or has on account of it incurred some loss or liability.

Appeal from District Court of Clear Creek County.

In 1882 one Orrin Skinner, on various false and fraudulent pretenses, obtained large sums of money from several banks in Georgetown, Idaho Springs, and other places, by getting cash on drafts which were returned unpaid. On the 26th day of October of that year, Skinner obtained from the Bank of Idaho Springs, of which McClelland, the appellee, was cashier, the sum of \$2,500, by presenting a draft on Cummings & Co., New York. About the 30th of the same month, McClelland learned by telegraph that this draft was protested. He at once instituted inquiries to ascertain the whereabouts of Skinner, and finally, about the 3d of November following, succeeded in intercepting him while on his way to Denver, and securing an interview at the depot in Idaho Springs. Payment of the draft was demanded. Skinner tendered to McClelland as such payment a draft which he had with him, drawn in his favor by the Merchants' Bank of Georgetown, the appellant herein, on its New York cor-

respondent, for \$3,000. Upon examining this draft, and becoming satisfied of its genuineness, McClelland accepted the same in payment, promising to remit the balance to Skinner, after deducting the \$2,500, with interest and certain expenses agreed upon. The latter draft was obtained by Skinner from the Merchants' Bank in exchange for his draft upon Cummings & Co. of New York. When it was presented by McClelland or his agent, appellant had been advised of Skinner's character and irresponsibility, and promptly declined to pay it. Thereupon McClelland brought this action in his own name, averring substantially, among other things, that, in receiving the draft as aforesaid for the Bank of Idaho Springs in payment of a debt due it, he became the trustee of an express trust. The defendant answered, basing its defense upon two principal grounds: *First*, that plaintiff was not the real party in interest, nor the trustee of an express trust, and therefore could not maintain the suit; *second*, that the circumstances under which the draft was obtained were such as to allow defendant the same defenses to the suit as it would have had against the original payee. Verdict and judgment for plaintiff. Appeal.

The remaining material facts are sufficiently stated in the opinion.

Messrs. MORRISON and FILLIUS, for appellant.

Messrs. T. B. BRYAN and H. W. HOBSON, for appellee.

HELM, J. The Bank of Idaho Springs was not a corporation. It was simply a partnership, composed of several individuals who contributed their money or labor to the enterprise. Plaintiff was one of the partners, having invested his own money in the undertaking. He was also the cashier. He had the custody of the funds, likewise the general management and control. He alone authorized loans and discounts, and transacted all of the

business. In his name, as cashier, contracts were habitually made for the bank.

Section 5, Code Civil Procedure, provides that the trustee of an express trust, though not the real party in interest, "may sue without joining with him the person or persons for whose benefit the action is prosecuted." It then gives the definition of such trustee as including "a person with whom or in whose name a contract is made for the benefit of another." The assignment, though made to McClelland as cashier, was in reality for the benefit of the Bank of Idaho Springs. Under our statute he became the trustee of an express trust, and as such was entitled to maintain the suit in his own name. The following cases, while not dealing with facts exactly similar, are yet sufficiently analogous in principle to be regarded as authorities supporting this conclusion: *Considerant v. Brisbane*, 22 N. Y. 389; *Burbank v. Beach*, 15 Barb. 326; *Wolcott v. Standley*, 62 Ind. 198; *Davis v. Reynolds*, 48 How. Pr. 210, and cases there cited. For many years the principle that an antecedent debt might constitute good and sufficient consideration for a new contract was denied, and there is yet conflict on the subject among the cases; but notwithstanding the contrary position of New York, Maine and other states, the decided weight of authority now supports the doctrine that such consideration is amply sufficient in connection with negotiable instruments. 1 Daniel, Neg. Inst. § 184; *Swift v. Tyson*, 16 Pet. 1; 3 Kent, Comm. 80; *Roberts v. Hall*, 37 Conn. 205; Pars. Notes & B. 257. For additional cases, see note found on page 273, 9 Amer. Dec.

This court has held "that one who takes *property* in payment or security of a pre-existing debt is to be regarded as a purchaser for valuable consideration." *Knox v. McFarran*, 4 Colo. 586; *McMurtrie v. Riddell*, ante, p. 497. If there is nothing upon the face of a negotiable instrument, or in the written indorsement or assignment, to notify the assignee that the instrument was

originally given upon an illegal consideration (gambling debts excepted), or obtained through fraud, the assignee who pays value therefor, and takes the same in good faith before maturity, may recover as against the maker. This is true, even though such assignee be in possession of facts or circumstances sufficient to arouse suspicion in the mind of a person of ordinary prudence; and though he is guilty of negligence in not first following up such information for the purpose of discovering the fraud or illegality to which the suspicious circumstances may seem to point. The latter part of this rule is not wholly unquestioned. Such able courts as that of Massachusetts deny its correctness; but we think it is supported by the better reason, as well as the great preponderance of authority. It is founded upon commercial necessity. The untrammelled circulation of these instruments is a matter of supreme importance in the vast field of mercantile transactions. Drafts, bills of exchange and other negotiable instruments take the place of money, and circulate almost as freely. To hold that each assignee must, before accepting them, inquire into each and every suspicious circumstance bearing upon the original execution, or pointing to possible defenses in a suit between the original parties, would produce serious inconvenience to the commercial world. Even as to instruments given for gambling debts, the courts submit to the statutory command with extreme reluctance. See the following cases, and others referred to therein: *Swift v. Smith*, 102 U. S. 442; *Hotchkiss v. National Banks*, 21 Wall. 354; *Murray v. Lardner*, 2 Wall. 110; *Brown v. Spofford*, 95 U. S. 474; *Welch v. Sage*, 47 N. Y. 143.

In *Kimbrow v. Lytle*, 10 Yerg. 423, "due course of trade" is said to be "where the holder has given for the note his money, goods or credit at the time of receiving it, or has on account of it incurred some loss or incurred some liability." The assignment of negotiable paper by operation of the bankrupt laws of the United States, by

operation of an assignment statute of the state, and the voluntary assignment by an insolvent to a trustee for the benefit of creditors, have each and all been declared to be assignments not in the regular course of business. In *Merriam v. Granite Bank*, 8 Gray, 254, it was held that the assignment of a note to a bank under such circumstances as to constitute an assignment without recourse was not made in the due course of trade, because such "is not the usual course of transferring a security indorsed in blank." The court, per Chief Justice Shaw, further says: "Had this note, with or without the indorsement of Willis & Co., been discounted by the bank, making it their own upon the credit of the parties to it, simply deducting the discount, it would have presented a far different question." The learned Chief Justice proceeds: "It is not easy to prescribe a general rule as to what shall be the common course of business. It must depend much upon the circumstances of each particular case."

In the case at bar the draft sued on was duly assigned by Skinner to plaintiff in payment of the \$2,500 due from the assignor to the Bank of Idaho Springs. It is true, plaintiff invited the town marshal to go with him to the train, and it is also true that the constable and perhaps a justice of the peace, through the invitation of a third party, were present. But the evidence shows that the transaction was amicable throughout. Plaintiff informed Skinner that his draft had been dishonored, and asked payment. Skinner willingly consented to and did make payment by means of the draft now in suit. He presented another draft at the same time, drawn by a third bank in his favor for the sum of \$2,400, which plaintiff recognized as genuine. That sum being insufficient, plaintiff accepted the \$3,000 draft instead. There is nothing to show that Skinner knew of the presence of a marshal, constable, or justice of the peace. No threats or coercion on the part of plaintiff, other than a simple

demand for his money, appear in evidence. The circumstance that Skinner had procured the discounting by plaintiff of a draft which had afterwards been dishonored, might have been sufficient to arouse a suspicion that the draft of defendant had not been procured in good faith; but the protestations and conduct of Skinner at the depot would naturally tend to allay such suspicion. Besides, we have seen that the existence of suspicions of this character is not alone sufficient. We do not find in the evidence anything to warrant the conclusion that plaintiff was guilty of *mala fides* in the transaction; and, since the rule which we have adopted is that an antecedent debt constitutes sufficient consideration to support the assignment of such paper, it is as though plaintiff had purchased the draft, paying full value therefor. The assignment did not take place in the bank, and over the cashier's desk or counter; but this is a matter of no special importance. We find no case that would sustain us in holding that the transaction did not take place in the due or regular course of business.

The foregoing conclusions dispose of all appellant's objections we deem it necessary to discuss, save one. It is claimed that the first instruction given on behalf of plaintiff excluded the element of bad faith from the consideration of the jury; that it practically informed the jury that, if the assignment was for a valuable consideration and before due, plaintiff could not have been guilty of bad faith,—a proposition which would be clearly erroneous. But an examination of the instruction, as contained in the original transcript on appeal, shows that counsel have inadvertently misquoted the language, and changed the punctuation of the court, both in their abstract and in their brief. Counsel for the appellee contend that the instruction as originally given contained the word "and" before "is" in the fifth line of the transcript, which word has been omitted therefrom by the scrivener; and say that a duly authenticated copy of the in-

struction as given is filed in this court. We do not find such authenticated copy. Besides, if we did, and if it were filed without first obtaining leave of court, thus making it properly a part of the record, we could not consider it. Taking the instruction, however, as it appears in the transcript, in connection with the rest of the charge, we are satisfied that it could not have misled the jury. The element of bad faith on plaintiff's part is fairly included in the succeeding instruction; and only by a change of punctuation, and an unnatural addition, can it be viewed as wholly omitted from this one. Considering the charge as a whole, we think the jury were sufficiently informed of their duty in this behalf.

The hardship suffered by appellant is to be regretted. But, under the legal principles announced, we do not see how it can escape liability in this action.

The judgment is affirmed.

Affirmed.

WILSON V. VOIGHT ET AL.

9	614
10	208
9	614
1a	143
2a	180
9	614
5a	414
9	614
8a	25
9	614
e15a	108
15a	108
15a	529
e15a	534
15a	535
9	614
20a	319

1. Where a chattel mortgage covers a stock of goods, and the mortgagor is permitted to remain in possession by the terms of the mortgage, and is allowed by the mortgagee to sell the goods in the regular course of trade, and retain the proceeds to his own use, the mortgage is void as to other creditors of the mortgagor.
2. In such case possession taken by the mortgagee under the mortgage does not protect property against attachment by another creditor.
3. The fact that the mortgage includes other property besides merchandise does not change the result. The instrument being void in part is void altogether.

Appeal from County Court of Clear Creek County.

In 1882 Voight was engaged in merchandising, renting a store-room for the purpose from Wilson. Upon dissolution of a partnership previously existing between Voight and Gerhardt, Voight retained the business, ex-

ecuting to Gerhardt for the latter's interest his promissory notes for some \$500, and also, to secure the same, a chattel mortgage upon the fixtures, tools, implements, accounts due, and stock in trade. This mortgage was in proper form and duly executed, but was not recorded. It provided that Voight should retain, use and enjoy the mortgaged property. At a subsequent date, Voight suddenly disappeared, leaving the accounts, fixtures, tools and implements, together with all of the goods that remained unsold, in the store-room rented from Wilson. Gerhardt, upon learning of Voight's disappearance, proceeded to the premises, took possession under his chattel mortgage of the remaining mortgaged property, and removed it to premises of his own. At the time of his disappearance, Voight owed Wilson for unpaid rent. Upon learning of Gerhardt's action in removing the property, Wilson immediately protested against such conduct, whereupon Gerhardt informed him of the chattel mortgage, and showed it to him; Wilson thus for the first time became aware of its existence. Wilson at once brought suit against Voight for the rent, and attached the property in Gerhardt's hands. Gerhardt interpleaded, asserting a right thereto by virtue of his chattel mortgage, and actual possession thereunder. Judgment was rendered in the county court for Gerhardt, from which judgment Wilson duly prosecuted this appeal. The remaining essential facts sufficiently appear in the opinion.

The following provisions of our chattel mortgage statute are involved in the case, viz.:

"No mortgage on personal property shall be valid, as against the rights and interests of any third person or persons, unless possession of such personal property shall be delivered to and remain with the mortgagee, or the said mortgage be acknowledged and recorded as hereinafter directed. Sec. 163, Gen. St.

"Any person who may buy or otherwise obtain any personal interest in any personal property which is mort-

gaged in pursuance of this act, but the mortgage of which has not been recorded, and with actual notice of such mortgage, shall be deemed and considered to have bought or obtained such interest in such property subject to such mortgage, the same as though such mortgage had been properly recorded." Sec. 172, Gen. St.

Messrs. GEO. M. DUNN and T. B. BRYAN, for appellant.

Messrs. T. J. CANTLON and J. C. FITNAM, for appellees.

HELM, J. A stock of merchandise constituted the larger part of the property covered by the chattel mortgage. The instrument contained a provision authorizing the mortgagor, until default, to retain the possession, use and enjoyment of the property mortgaged. It is difficult to understand how the mortgagor could "use and enjoy" a stock of merchandise, without selling or disposing of the same. But we shall assume that the instrument contains no language affecting its validity. The testimony of the mortgagee himself establishes the following facts, viz.: That, after the mortgage was executed and delivered, the mortgagor continued to sell and dispose of goods from the stock included, in the ordinary and regular course of trade; that he applied none of the proceeds from such sales to the payment of the notes secured by the mortgage, but retained the same for his own use and benefit; and that these things were done with the full knowledge and consent of the mortgagee. This sale of goods and disposition of the proceeds with the mortgagee's consent were acts wholly at variance with the idea of *security*, fundamental to such transactions,—acts which were inconsistent with the purposes of chattel mortgage statutes, and stamped upon the entire transaction a brand of bad faith difficult of satisfactory explanation.

Upon the foregoing position the authorities are in perfect accord; but not so as to the following question: Do

the facts that the mortgagor, with the mortgagee's knowledge and consent, continues to dispose of merchandise mortgaged, without applying the proceeds or any part thereof to a reduction of the mortgage debt, render the mortgage absolutely void as to other creditors of the mortgagor, or do these acts simply constitute a badge of fraud which may be overcome by proof of the validity of the mortgage debt, and perfect *bona fides* of the transaction in all other respects? Upon this question there is great contrariety of judicial opinion. Borrowing the expressive language of Mr. Justice Davis in *Robinson v. Elliott*, 22 Wall. 513: "The cases cannot be reconciled by any process of reasoning or on any principle of law."

At common law, personal property could only be made security for a debt by actual delivery into the creditor's custody. To obviate the inconvenience thus arising, and to meet the growing demands of trade, statutes similar to ours were enacted, authorizing the debtor until default upon compliance therewith, to retain the possession, use and enjoyment of the property mortgaged. Under these statutes, when complied with, the mortgagee's lien is good for a specified period, even though there be no change of possession. But such statutes were never intended to sanction the entire destruction of the thing itself, or its value, constituting the security. The use and enjoyment mentioned are a use and enjoyment not inconsistent with the continued protection of the mortgagee and other creditors of the mortgagor. When the mortgagee stipulates, either in the mortgage or out of it, that the mortgagor may sell the very thing composing his security, and retain the proceeds, he thereby destroys every vestige of a valid statutory or common-law mortgage, and leaves himself in no better position than if it had not been executed. Besides, the inevitable tendency of the transaction is disastrous to other creditors of the mortgagor; for the effect is to hinder and delay such creditors, while the mortgagor makes way with the property, and leaves

the general aggregate of his indebtedness undiminished. Predicated upon these considerations is the view sustained, as we think, by the larger number and the better reasoned cases, viz., that the *existence* of the facts mentioned, whether shown by the mortgage or by evidence *aliunde*, wholly invalidates the transaction as to creditors.

The position that the motive of the mortgagor and mortgagee should, under such circumstances as those before us, remain a question of fact to be determined by a jury upon all the evidence, is taken in able and ingenious opinions; but when carefully analyzed, it will be found that these opinions are based more upon considerations of probable hardship and inconvenience in individual cases than upon solid principles of law, or broad and intelligent grounds of public policy. We shall not review or discuss these cases, or those supporting the conclusions adopted, but content ourselves by referring counsel to the very thorough and learned consideration thereof by Mr. Pierce in his excellent work on Mortgages of Merchandise. See, also, *Bank v. Goodrich*, 3 Colo. 139.

We do not hold that a mortgage upon merchandise permitting the mortgagor to continue the sale of goods, but requiring him to apply the proceeds in discharge of the debt secured, is void as to his other creditors. The validity of such mortgages, the transaction being *bona fide*, is upheld by many well-considered decisions. In such cases the value of the security suffers no diminution, except as the debt secured is itself diminished. The transaction is not unlike the delivery of goods in payment of the debt of a preferred creditor; since the aggregate of the mortgagor's indebtedness is reduced, and since he may pay whom he will, the unpreferred creditors are held to suffer no legal wrong.

The mortgage in the case at bar, being void as to creditors, could not, in our judgment, strengthen the possession taken by the mortgagee. A void instrument cannot

be the foundation of a valid lien. When the mortgagee seized the property, he occupied the attitude of a mere general creditor without any specific lien. His seizure gave him no advantage. Any other *bona fide* creditor could levy his attachment or execution upon the goods in controversy, and thus secure precedence in the payment of his debt therefrom. *Blakeslee v. Rossman*, 43 Wis. 116; *Robinson v. Elliott*, *supra*; Pierce, Mortg. Mdse. § 143, and cases. It should be borne in mind that the seizure is shown to have taken place *under the mortgage*. There is no claim of a voluntary delivery by the mortgagor as a pledge or payment, constituting an entirely new and independent transaction.

The fact that other property besides merchandise was included in the mortgage does not affect the result. There are cases which hold that such an instrument may be void in part and in part valid. *Barnet v. Fergus*, 51 Ill. 352; *In re Kahley*, 2 Biss. 383; *Re Kirkbride*, 5 Dill. 116. But we are inclined to accept and apply the doctrine, elsewhere announced, that, if the mortgage be void as to a portion of the property mentioned therein, it is void altogether. *Horton v. Williams*, 21 Minn. 187; *Russell v. Winne*, 37 N. Y. 591. It is the *agreement to sell*, retaining the proceeds, or the *act of selling* with the mortgagee's consent, and retention of the proceeds, that invalidates the transaction. Whether this agreement or this act relate to one part of the property mortgaged or another is a matter of little significance. In a case like the one at bar, where there is no express agreement, why should the mortgage be held good as to fixtures, but void as to the goods remaining unsold? It may be that no more goods would have been disposed of. And it may be that had things remained *in statu quo*, and Voight returned, he would have proceeded to sell the fixtures. If, under a contract providing for the sale of merchandise, the mortgage may remain valid as to fixtures and other property, it should follow that when the contract related

to a particular line of goods, or a particular part of the stock, the mortgage would remain unassailable as to the rest of the wares or commodities. The welfare of all parties interested will, we think, be best subserved by holding the mortgagee to a strict degree of care in seeing to it that the transaction is not tainted with this objectionable feature. There will, in our judgment, be less confusion, and in the end less real injustice, by adhering to the rule that if the mortgage is, upon this ground, void in part, it is wholly void.

The judgment is reversed.

Reversed.

IRRIGATION.

In the matter of Senate Resolution on the Subject of Irrigation.

It could not have been the intention of section 2, article VI, of the constitution as amended in 1885, to authorize an *ex parte* adjudication of individual or corporate rights by means of a legislative or executive question submitted to the supreme court, nor to exact in response to a legislative inquiry a wholesale exposition of all constitutional provisions relating to a given general subject, in anticipation of the possible introduction or passage of measures bearing upon particular branches of such subjects.

PER CURIAM. The resolution before us purports to have been framed under the authority conferred by section 2, article VI, of the constitution as amended in 1885. The amendment in question reads as follows:

“The supreme court shall give its opinion upon important questions upon solemn occasions when required by the governor, senate, or the house of representatives; and all such opinions shall be published in connection with the reported decisions of the court.”

It is obvious that this constitutional provision will become the medium of great abuses, unless its purpose be

9	630
12	236
12	470
9	630
13	321
9	620
15	523
15	594
9	620
18	196
9	620
19	62
19	67
19	571
9	620
21	15
21	33
9	620
26	144
9	620
27	103

clearly comprehended and its spirit be strictly obeyed by both the general assembly and the court. In acting thereunder the peculiar functions devolved upon each of the three departments into which the state government is divided, should always be kept in view.

It could not have been the intention to authorize an *ex parte* adjudication of individual or corporate rights by means of a legislative or executive question; parties must still adjudicate their rights in the ordinary and regular course of judicial proceeding. Nor could the purpose have been to exact in response to a legislative inquiry a wholesale exposition of all constitutional provisions relating to a given general subject, in anticipation of the possible introduction or passage of measures bearing upon particular branches of such subject.

The questions propounded by the resolution under consideration call for a construction of sections 5, 6, 7 and 8, article XVI, of the constitution. These sections comprise all of that instrument that deals with the subject of water rights, a subject second to none in its importance and intricacy. Our answer to the questions would necessarily affect vast property interests and profound questions of public policy. We are not apprised by the resolution that the various matters mentioned are covered by any act or acts pending before the general assembly. There are now in this and other courts of the state actions through which some of these matters are in process of adjudication. To anticipate these cases and pass, in this summary manner, upon the rights involved, without the parties before us, and without the aid of counsel, is something we should not be asked to do except upon the gravest and most urgent necessity.

It is not improper for us to further suggest that a satisfactory response to the resolution would require vast research and extraordinary caution. In view of the fact that we must act both as court and counsel, and in view of the other duties which we must necessarily perform,

the period of time provided for a legislative session would hardly be sufficient to return safe and satisfactory answers to more than one such inquiry.

We shall always most cordially co-operate with both houses of the general assembly in their work, so far as such co-operation may be proper under the constitution. But the foregoing and other considerations that will readily suggest themselves, constrain us to respectfully request that your honorable body consider the propriety of withdrawing the questions embodied in this resolution.

TAXATION OF PATENTED MINING LANDS.

In the matter of House Resolution in relation to the construction of section 3 of article X of the State Constitution, concerning the Taxation of Patented Mining Lands.

Legislation is necessary to render effective section 3 of article X of the constitution, providing for the taxation of patented mining lands.

PER CURIAM. The question submitted is, "Whether any legislation is required by the sixth general assembly to render patented mining lands subject to taxation in view of the expiration of the said period of exemption as provided in section 3 of article X of the state constitution?"

We are of the opinion that the constitutional provision referred to contemplates legislation to render it effective for the purpose mentioned.

TAXATION OF PATENTED MINING LANDS.

In the matter of the Constitutionality of House Bill No. 18, entitled "A Bill for an Act providing for the Taxation of Patented Mining Lands in Colorado."

The adoption of the amendment of section 3 of article X of the constitution did not extend the period of exemption limited for the taxation of mines and mining property beyond the period provided in the original section.

THE question submitted is, did the adoption of the amendment to section 3, article X, of the constitution submitted in 1879, extend the period of exemption limited for the taxation of mines and mining property beyond the ten years mentioned and provided in the said original section 3, article X?

PER CURIAM. The question submitted to us must be answered in the negative.

COURT OF APPEALS.

9	623
15	679
16	279

In the matter of the constitutionality of Senate Bill No. 76, entitled "A Bill for an Act to create a Court of Appeals; to provide for the appointment of the justices thereof; and to regulate the practice therein." Submitted to the Supreme Court for its opinion.

1. The judicial power, both appellate and original, lodged by the constitution in the supreme court, cannot be transferred to another court created by the legislature in any manner so as to make its decisions final.
2. All laws relating to courts shall be general and of uniform operation throughout the state.

PER CURIAM. In so far as the bill submitted to us provides that the decisions and opinions of the "court of

appeals," therein provided for, upon causes pending in the supreme court, shall have the same force and effect as the decisions and opinions of the supreme court, we are of the opinion that it is unconstitutional.

(1) The judicial power, both appellate and original, lodged by the constitution in the supreme court, cannot be transferred to another court created by the legislature in any manner so as to make its decisions and opinions final. This jurisdiction is lodged in "a supreme court." Two such courts with like jurisdiction and powers is not contemplated by the constitution.

(2) If it were within the legislative power to create another court with equal appellate and original power as the supreme court, the bill would still be obnoxious to section 28 of article VI of the constitution, which declares that "all laws relating to courts shall be general and of uniform operation throughout the state; and the organization, jurisdiction, powers, proceedings and practice of all the courts of the same class or grade, so far as regulated by law, and the force and effect of the proceedings, judgments and decrees of such courts severally, shall be uniform."

CREATION OF NEW COUNTIES.

In the matter of House Bill No. 231.

1. Under section 17, article V, of the constitution, a bill introduced cannot be so amended as to change its original purpose.
2. While the legislature may enter into an investigation to ascertain and determine the ratable proportion of existing liability to be assumed by a new county, it is eminently proper to remit the same to the appropriate local authorities under suitable legislation.

Two questions are submitted in this proceeding to the supreme court for determination, viz: Can the legislature, in view of section 17, article V, of the constitution,

so amend the bill which was introduced for the purpose of creating the new county of Logan, from territory embraced within the present county of Weld, as to establish the new county of Montezuma from territory carved out of the present county of La Plata? And, under section 4, article XIV, of the constitution, is not the general assembly the "properly authorized body" to "ascertain or determine" the ratable proportion of existing liabilities of the old county, which the new county shall be held to pay?

PER CURIAM. We are of the opinion that the amendment proposed changes the "original purpose" of the bill, and, therefore, that such alteration is inhibited by the constitutional provision mentioned.

The legislature may, should it see fit so to do, "ascertain or determine" the ratable proportion of existing liability to be assumed by the new county. But such ascertainment or determination involves a careful and thorough investigation of the various matters necessarily relating to the subject. And while the legislature may enter into such investigation, it is eminently proper to remit the same to the appropriate local authorities under suitable legislation, as contemplated by sections 11 and 12 of the original bill now before us.

JURISDICTION OF JUSTICES OF THE PEACE.

In the matter of the constitutionality of House Bill
No. 158.

Under section 8, article II, of the constitution, the general assembly may provide for prosecuting misdemeanors before justices of the peace, upon sworn complaint or other information.

THE question submitted relates to the jurisdiction conferred upon justices of the peace by the bill mentioned, being "An act to prevent the killing and trapping of beaver in the state of Colorado for a period of six (6) years."

PER CURIAM. Under section 8, article II, of the constitution, the general assembly may provide for prosecuting misdemeanors before justices of the peace upon sworn complaint or other information. We are, therefore, of the opinion that the bill referred to is not obnoxious to objection under this provision. The method of procedure may, for convenience, be incorporated into the act by reference to section 760 of the General Statutes, or otherwise, as the legislature in its wisdom shall deem appropriate.

STATE INSTITUTIONS.

In the matter of Senate Resolutions as follows, to wit:

"That whereas doubt exists as to the meaning of section 5, article VIII, of the constitution,

"Therefore be it resolved that the following question be submitted to the supreme court, to wit:

"Does the constitution prohibit the removal of either of the institutions referred to in said section from their present location, or the consolidation of any two or more at the present location of any one, or at some place remote from the location of either?"

The location of the Agricultural College and certain other institutions having been fixed by the constitution, such location cannot be changed except by amendment of the constitution.

PER CURIAM. At the date of the adoption of the constitution, the several territorial institutions named in

section 5, article VIII, were already in existence and located respectively at the points mentioned in said section.

The first declaration of the section is as follows:

"The following territorial institutions, to wit, the university at Boulder, the agricultural college at Fort Collins, the school of mines at Golden, the institute for the education of mutes at Colorado Springs, shall, upon the adoption of this constitution, become institutions of the state of Colorado." It is not entirely clear but what this provision in itself involves a constitutional location of the several institutions mentioned at the places specified. The next declaration, that the *management* of said institutions shall be "subject to the control of the state, under such laws and regulations as the general assembly shall provide," taken in connection with the context, is apparently a limitation of legislative control (excluding power to remove), in harmony with this view.

Independently, however, of these provisions, the section declares that "the location of said institutions, as well as all gifts, grants and appropriations of money and property, real and personal, heretofore made to the said several institutions, are hereby confirmed to the use and benefit of the same, respectively." This is an awkwardly constructed sentence, but we think it sufficiently indicates an intention to fix the location of the several institutions specified permanently at the points named. The word "location" in this section is used in its ordinary sense, and in the same sense as used in section 2 of the article, namely: "In the sense of situation with respect to place." The use of the word "location" in the only other sense in which it could have any legal meaning or effect, would be unusual, and, having reference to the rest of the sentence, unnecessary.

We call attention to sections 2 and 4 of the article. If the framers of the constitution had not regarded section 5 as permanently locating the institutions named, it

is reasonable to suppose that they would have made some explicit provision with regard to their permanent location, as they did in the case of the state capital (sec. 2), and likewise prohibited any expenditure in advance, as in section 4. The absence of such provisions supports the construction which we have given.

It follows that the locations of the institutions named, or of any one of them, cannot be changed except by an amendment to the constitution.

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NOTARIES PUBLIC.

In the matter of House Bill No. 166: "A Bill for an Act concerning Notaries Public."

Under the constitution of this state qualified electors only are eligible to the office of notary public, and a bill providing for the appointment of women to such office, *held* to be unconstitutional.

THE question submitted for the opinion of the supreme court is, whether the provisions of said bill permitting the appointment of women as notaries public is constitutional.

PER CURIAM. Section 6 of article VII of the constitution prohibits the election or appointment to any civil or military office in the state of any person except a qualified elector.

Judge Story discusses the question, who are civil officers within the meaning of the fourth section of the second article of the constitution of the United States, and his conclusion is, that "all officers of the United States * * who hold their appointments under the national government, whether their duties are executive or judicial, in the highest or lowest departments of the government, with the exception of officers in the army or navy, are

properly civil officers within the meaning of the constitution." Story on Constitution, secs. 789-792.

A government office is defined to be "a public station or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties." *U. S. v. Hartwell*, 6 Wall. 385-393.

An office held under a state government necessarily includes the same characteristics, and all of them are comprised in the office of notary public, as will appear by reference to the several statutory provisions in relation thereto.

Again, section 10 of article XIV of our constitution makes ineligible to hold any county office every person who is not a qualified elector. A notary public, while holding his office by the appointment of the governor, can exercise the functions thereof only in the county for which he is appointed. In this sense he is a county officer. *Hill v. Bacon*, 43 Ill. 477.

The term "qualified elector," as employed in the foregoing constitutional provisions, is used in its broadest sense, meaning a person qualified to vote generally. We are of opinion, therefore, that said bill is unconstitutional in so far as it provides for the appointment of women as notaries public.

COMPULSORY ARBITRATION.

In the matter of "A Bill for an Act to provide for the amicable adjustment of grievances and disputes that may arise between employers and employees, and to authorize the creation of a Board of Arbitration."

Section 8 of article XVIII of the constitution neither contemplates nor admits of a law providing for the compulsory submission of differences to arbitration.

QUESTION submitted for the opinion of the court: Is said bill, as to its compulsory provisions, in conflict with section 3, article XVIII, of the constitution, and of section 7, article II, of the bill of rights?

PER CURIAM. We are of the opinion that section 3, article XVIII, neither contemplates nor admits of a law providing for the compulsory submission of differences to arbitration. A submission of differences to the decision of arbitrators must be by mutual agreement of the parties to the controversy, who (in the language of the section) choose that mode of adjustment.

We see nothing in the provisions of the bill in conflict with section 7, article II, of the bill of rights.

RECALLING BILLS.

In re Senate Resolution relating to the recall of Bills transmitted to His Excellency the Governor for approval.

There is nothing in the constitution forbidding the legislature by concurrent resolution requesting the return of a bill in the hands of the governor, nor forbidding a reconsideration and amendment of a bill thus returned.

PER CURIAM. We discover nothing in the constitution or statutes that forbids the legislature's requesting, by joint or concurrent resolution of both houses, the return of a bill in the hands of the governor for his approval, or which directs or controls the action of his excellency in response to such request.

Neither do we find any provision in the constitution or statutes which inhibits a reconsideration and amendment, if in accordance with the parliamentary practice adopted by the respective houses, of a bill thus returned.

COUNTY TREASURERS.

9a 631
c26 132

In the matter of House Bill No. 38, "A Bill for an Act to fix the term of office of County Treasurers." Submitted for the opinion of the Supreme Court.

1. Under section 30, article V, of the constitution, the legislature may fix the commencement of the term of office of county treasurers.
2. The power to fill a vacancy in such office is lodged in the board of county commissioners by section 9, article XIV, of the constitution.

PER CURIAM. (1) The purpose of the bill is not to *extend* the term, but to fix the *commencement* of the term of office of county treasurers, and is not in conflict with section 30, article V, of the constitution.

(2) The effect of the act, should it become a law, will be to leave a vacancy extending from the date of the expiration of the term of office of county treasurers as now fixed by law and the date of the commencement of the term as fixed by this act. The power to fill this vacancy is lodged in the board of county commissioners by section 9, article XIV, of the constitution.

NOMINATIONS TO PUBLIC OFFICES.

In the matter of House Bill No. 203, "A Bill for an Act to prevent frauds in the nominating public officers." Submitted for the opinion of the Supreme Court.

9b 681
10 112

The correction of abuses in the nomination of candidates for public officers is a proper subject of legislation and entirely within the legislative power.

RESOLUTION.

"Whereas, doubts exists as to the constitutionality of house bill No. 203, therefore be it resolved by the senate of the state of Colorado:

"That the supreme court be respectfully requested to answer the following interrogations:

"1st. Is it constitutional to enact any law attempting to regulate the machinery of a political party in making nominations of candidates for public offices?

"2d. Can the law take any cognizance of political parties as such?

"3d. Can the law interfere in any wise with the modes and methods employed by a political party in the nomination of its candidates for public office?

"4th. Are the provisions of the bill properly the subject-matter of legislation?

"*Resolved*, That a copy of said bill and a copy hereof be forthwith transmitted by the secretary to the supreme court."

PER CURIAM. We do not find any constitutional objection to the bill submitted for our consideration, nor is our attention called to any provision of the constitution as forbidding such legislation.

The abuses sought to be corrected by the provisions of the bill are of the gravest character and are a proper subject of legislation, entirely within the legislative power. *Leonard v. The Commonwealth*, 112 Pa. St. 622; *McCreary on Elections*, sec. 192, and cases there cited.

COMPUTATION OF TIME.

9	632
16	465

In the matter of Senate Resolution of March 31, 1887, requesting a construction of Section 11, Article IV, of the Constitution, in relation to Senate Bill No. 56.

1. In the computation of time prescribed by constitutional or statutory provisions for the performance of official acts, the general rule is that fractions of a day are not to be noticed, but each fraction is to be considered in the computation as a full day.

2. When the law requires an act to be performed within a given number of days from a day mentioned, the rule is to include one of the two days mentioned and to exclude the other.
3. In case of administrative and judicial acts, if the return day of a writ, the completion of service by publication, or the day upon which court is to sit, falls upon a Sunday, the return day or court day is continued and becomes the Monday succeeding, unless the same should be a legal holiday. In such class of cases there can be no curtailment of the full period of time allowed by law.

STATEMENT.

The question submitted for the opinion of the supreme court is as follows: Is senate bill No. 56, under the provision of section 11, article IV, of the constitution, a law, the veto of the governor to the contrary notwithstanding?

The facts stated, and upon which the resolution is predicated, are that senate bill No. 56 passed both houses of the general assembly, and was presented to the governor for his approval at 11:10 A. M. March 17th, and was returned without his approval on the afternoon of March 28th.

On Saturday, March 26th, the senate was not in session. The following day, March 27th, was Sunday, and the senate was not in session.

The constitutional provision is: "If any bill shall not be returned by the governor within ten days after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the general assembly shall, by their adjournment, prevent its return, in which case it shall be filed with his objections in the office of the secretary of state within thirty days after such adjournment or else become a law."

OPINION.

PER CURIAM. 1st. In the computation of time prescribed by constitutional or statutory provisions for the performance of official duties, the general rule, subject to no exception occurring in the present case, is, that fractions of a day are not to be noticed, but each fraction

of a day is to be considered in the computation as a full day.

It is therefore immaterial at what precise hour the bill was presented to the governor on March 17th, or at what hour he returned the same to the senate on March 28th.

2d. When the law requires an act to be performed within a given number of days from a day mentioned, or from the performance of a certain act, the rule of computation adopted by this court, and sanctioned by the weight of authority on the subject, is, to include one of the two days mentioned, and to exclude the other. In accordance with this rule, the bill having been presented to the governor for his signature on March 17th, it would be returnable to the senate on March 27th, unless by the happening of some event, or the intervention of some other principle of construction, the return should be postponed to a subsequent day.

3d. In certain commercial transactions, as in the presenting for payment or acceptance, or in the protesting and giving notice of dishonor of bills of exchange, promissory notes and bank checks, if the day upon which the act is to be performed falls upon Sunday, by statute and by usage, the instruments mature and the act must be performed on the day previous. But a different rule obtains as to administrative and judicial acts. If the return day of a writ, the completion of service by publication, or the day upon which a court is to sit, whether by adjournment thereto or otherwise, falls upon Sunday, the return day or court day is continued and becomes the Monday succeeding, unless the same should be a legal holiday. In the latter class of cases there can be no curtailment of the full period of time allowed by law. The intervention, however, of Sunday, or of a legal holiday, between the first and last days of the prescribed period, is not to be noticed, unless said day or days is or are expressly excepted by the law itself.

The constitutional provision in question does not exclude Sunday from the ten days allowed the governor for consideration and return of bills presented to him by the general assembly. If, therefore, Sunday had intervened between the day of presentation and the return day of this bill, it would have legally constituted one of the ten days. It happened, however, that the return day, March 27th, fell upon Sunday, and the general assembly not being in session upon that day, no opportunity was afforded to the governor to communicate with that body. Having, by virtue of the constitutional provision, ten days within which to return the bill, it follows from reason and principle that the return day was continued by operation of law until Monday, March 28th.

For the foregoing reasons we are of opinion that said bill No. 56 did not become a law under the provision of section 11, article IV, of the constitution, but requires further action on the part of the general assembly.

TAXATION OF MINING CLAIMS.

In the matter of the constitutionality of House Bill No. 270, and Senate Bills Nos. 69 and 106, in relation to the Taxation of Mines and Mining Claims.

The constitution does not authorize the general assembly to assess any class of property for taxation. This must be done by the proper officer upon a just valuation.

PER CURIAM. The three bills, transmitted by the senate for the opinion of the supreme court as to their constitutionality, severally make provisions for the taxation of a species of property which has heretofore been exempt from taxation, by virtue of a provision in section 3 of article X of the state constitution.

Our attention not being called to the details of any of

these bills, by the questions submitted, we apprehend that the point upon which our opinion is solicited is whether the mode of taxation provided in the respective bills is constitutional.

We observe, in the first place, that while the necessity for specific legislation applicable to this class of property was foreseen by the framers of the constitution, as is evident from the provision, "and thereafter may be taxed as provided by law," yet there is neither authority nor reason for holding that a mode of taxation might be provided by law, at variance with the constitutional provisions and principles bearing upon the general subject of taxation.

The constitution does not authorize the general assembly to assess any class of property for taxation. Before taxes can be levied upon any article of property, it must be assessed, that is to say, valued for taxation. This, in general, is the province of officers whose title of office indicates their duties, to wit, assessors. The constitution has created this office, and requires that an assessor shall be elected biennially in every county of the state. Legislative jurisdiction over the assessment of property, in the legal signification of that term, is limited by the constitution, so far at least as counties and other municipal corporations are concerned, to the enactment of "general laws which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal."

Also, in respect to the taxation of property, or the levy of taxes, the general assembly can only impose taxes for state purposes. It is prohibited by section 7 of article X from imposing "taxes for the purposes of any county, city, town or other municipal corporation," but authorized to vest such power in the corporate authorities.

It is likewise authorized to fix the rate per centum which shall be levied upon the assessed valuation of property for state taxes, and it may prescribe a maxi-

imum rate per centum on the assessed valuation for county taxes.

Have these constitutional principles and provisions been observed in the framing of the bills submitted?

Section 1 of house bill No. 270 provides for an annual assessment or valuation of all patented mining claims, but sections 2 and 3 are inconsistent with this provision, and their effect is to nullify it under circumstances very likely to arise.

As we have seen, taxes are levied upon valuations ascertained and fixed by the proper officers. Essential to a levy is the fixing of a mill rate, or per centum. For state taxes this rate is fixed by the general assembly; for county taxes it is fixed by the board of county commissioners. We have then, in the case of a mining claim, a valuation fixed by the assessor; also a certain mill rate, or per centum, to be levied for state taxes, and another rate to be levied for county taxes. But section 2 of this bill, if we understand it correctly, provides that the entire levy, in other words, the entire tax imposed on a placer mine, shall not exceed \$25 per acre; and section 3 provides that the entire tax imposed on all other mining claims shall not exceed \$40 for each one hundred linear feet. Suppose that the mill rate prescribed for county purposes, when levied upon the assessed valuation of a mining claim, shall produce the maximum amount of tax permitted by this bill, what becomes of the state's proportion of revenue from that claim, or *vice versa*?

In such case it may be said that, although one section of the bill secures a just valuation of the mine for the purposes of taxation, yet these purposes are defeated by other sections of the same bill.

Our opinion is that this bill does not provide a constitutional mode of taxation.

Referring to senate bill No. 69, we find that the mode of taxation provided is obnoxious to at least two constitutional objections.

First. While the assessment is, by the provisions of section 4, nominally made by the assessors, it is in fact made by the general assembly. It provides that all lode claims shall be valued at \$70 per acre, and all placer claims at \$25 per acre, surface measurement.

Second. No regulations are prescribed for securing a just valuation for taxation of different mining claims, but all lode claims, irrespective of their real value, are assessed at an arbitrary sum, and all placer claims are in like manner assessed at another arbitrary value.

These are substantial objections, and, in our judgment, render this bill unconstitutional.

We now come to senate bill No. 106. This bill divides mining claims for the purpose of taxation into five classes, according to the gross product thereof in the year ending December 31st, preceding the assessment. It then proceeds by section 4, if we interpret it correctly, to impose a specific tax on each one hundred feet of all lode claims, making the amount of the tax to be imposed on a lode claim to depend upon the class to which it belongs, and its linear extent.

There is a further provision, that if a lode claim exceeds one hundred and fifty feet in width, the rate of assessment shall be increased according to its width.

The same principle is applied to placer claims, except that the specific amount of taxes prescribed for the several classes into which they are divided depends on acreage, instead of length and width in feet.

The constitutional objections to this mode of taxation are:

First. The general assembly by it virtually levies the entire tax, both for state and county purposes, which, as above shown, is beyond its jurisdiction.

Second. This total levy is not based upon any valuation, a prerequisite to a valid levy.

Third. The bill discards the regulations now prescribed by statute for securing a just valuation of real estate for taxation, and in lieu thereof fails to provide any mode

for securing a just valuation of mining claims for this purpose. For these reasons this bill must be also held to be unconstitutional.

While holding that there is no other constitutional basis for the taxation of property than that of valuation, we fully appreciate the difficulty of devising any plan which will enable an assessor to ascertain the quantity of precious metals which lie hidden from sight in the treasure vaults of our mines, and to correctly estimate their values. At best, the true values of mining claims can only be approximated.

In connection with this subject the legislature must encounter peculiar difficulties, from the nature of the property. Yet it is not only proper, but it is the duty of that body to provide by statute some system or basis for determining the valuation of this, as well as all other kinds of property. And if the legislature should see fit to make the gross output of producing mines the criterion to govern assessors in determining the valuations of this class of mining property, we perceive no constitutional objections to the method.

ESTABLISHMENT OF NEW COUNTIES.

In the matter of the constitutionality of Section 9 of House Bill No. 122, "A bill for an act to establish the county of St. Vrain, and to provide for terms of court therein." Submitted for the opinion of the Supreme Court.

In creating a new county out of parts of one or more existing counties, under section 4, article XIV, of the constitution, the new county may be made liable for a ratable proportion of the existing liabilities of the counties out of which the new county is created.

PER CURIAM. Our opinion is solicited as to the constitutionality of section 9 of said bill, and our attention is directed to sections 4 and 5 of article XIV, section 12 of

article XV, and section 25 of article II, of the constitution.

The question as stated is: "In the event of the passage of said bill, will the people of those portions of the counties of Weld and Larimer which are included within the limits of the proposed new county of St. Vrain be responsible for the payment of the whole or any part of the debt of the present county of Boulder?"

While sections 4 and 5 of article XIV of the constitution relate to a common subject, viz., the *pro rata* payment of existing liabilities upon a subdivision of a county or counties, yet they relate to this subject under wholly different circumstances and conditions. A distinct and different rule is likewise provided for each case.

Section 4 refers to the liabilities of a new county created out of a part or parts of one or more existing counties. Section 5 has no reference to the formation of a new county, but to the division of an existing county, whereby a portion of its territory is stricken off and added to another existing county. In the first case, the new county, as a distinct organization, is "held to pay its ratable proportion of all then existing liabilities of the county or counties from which such new county shall be formed;" in the second, the original liability of the part stricken off is continued.

This construction of said sections 4 and 5 is not inconsistent with section 25 of article II of the constitution, and the provisions of said section 4, being special provisions for specified objects, they are not affected by section 12 of article XV.

We are of opinion that the bill submitted presents a case falling within the provisions of said section 4 of article XIV, and that section 9 of the bill is in conflict therewith.

In answer to the question submitted, we say that the new county, as a whole, will be liable for a ratable proportion of the existing debt of Boulder county.

READING OF BILLS.

In the matter of the constitutionality of Senate Rule
No. —.

Under section 22, article V, of the constitution as amended, the reading of a bill at length in committee of the whole, together with the reporting and recording of the fact upon the journal, may be treated as one reading of the bill.

On the 8th day of January, 1887, the state senate, under section 3, article VI, of the constitution as amended, duly presented to the supreme court for determination, a matter substantially as follows:

May the consideration of a bill as provided for in the following proposed senate rule be regarded as one reading thereof under the provision of the constitution relating to the subject?

“Every bill shall be read at length in the committee of the whole (unless the committee decide to recommend that the enacting clause be stricken out), the chairman shall so report, an entry thereof shall be made in the journal, and such reading shall be considered one of the readings required by the constitution.”

PER CURIAM. We are of the opinion that the reading of a bill at length in committee of the whole, together with the reporting and recording upon the senate journal of the fact of such reading, as provided by the foregoing rule, may be treated as one reading of the bill under amended section 22, article V, of the state constitution.

VETO POWER — SPECIAL SESSION OF GENERAL ASSEMBLY.

1. A bill being vetoed by the governor, and the general assembly failing to pass it, notwithstanding the veto, existing legislation upon the subject-matter of the bill remains undisturbed.
2. The necessity for the convention of the general assembly in special session, under section 9, article IV, of the constitution, rests entirely with the executive.

.PER CURIAM. Whether section 45, article V, of the constitution is mandatory or not, the legislature having treated it as mandatory, and passed a bill in compliance with its provisions, it was, like any other bill, subject to the veto power lodged in the executive.

The bill having been vetoed by the governor, and the legislative assembly having failed to pass it, notwithstanding the veto, the existing legislation upon the subject-matter of the bill remains undisturbed and in force.

Whether or not an occasion exists of such extraordinary character as demands a convention of the general assembly in special session, under the provisions of section 9, article IV, of the constitution, is a matter resting entirely in the judgment of the executive.

INDEX.

ABANDONMENT: See **CONTRACTS**, 16.

ADIT:

Section 7, Gen. Laws Colo. p. 630, which provides that “* * * an adit of at least ten feet in, along the lode, from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft,” contemplates that as to the ten feet required it might be either open or under cover, or open in part and under cover in part, dependent upon the nature of the ground. *Electro-M. M. & D. Co. v. Van Auken*, 204.

“ADVERSE:”

1. Before either party can recover in an “adverse” mining suit, he must show a compliance with the statutes, state and federal, and local miners’ rules and regulations relating to the *location* of mining claims. Proof of occupancy merely will not suffice. *Becker v. Pugh*, 589.

2. The miners’ regulations of Gregory district, adopted in 1860, required the locator to indicate by stakes or otherwise upon the surface, the ground or the vein sought to be appropriated. *Ib.*

3. An action in the nature of ejectment is proper in support of an adverse filed in the land office. But the ordinary rules in ejectment are somewhat modified. *Ib.*

4. Under the code, a party is entitled to such relief as his evidence, together with the facts averred in the body of his pleading, justify, regardless of the relief demanded in his prayer. *Ib.*

See **CROSS-VEINS**.

AGENT:

1. The principal is bound by all acts of the agent within the scope of the authority, as held out to the world by the principal, although more limited private instructions have been given which are unknown to persons dealing with him. *Higgins v. Armstrong*, 88.

2. That an agency may be proved by the habit and course of dealing between the parties is clear upon principle and authority. *Ib.*

3. Notice of facts to an agent is constructive notice to the principal himself when it arises from, or is at the time connected with, the subject-matter of the agency. *Ib.*

4. The rule that unless the ratification by the principal of the acts, doings or omissions of his agent be made with full knowledge of all the circumstances of the case, it will not be obligatory upon him, whether the principal’s want of knowledge arises from the design, concealment or misrepresentation of the agent or from his own innocent inadvertence, *held* not applicable to executory contracts involving the features of this case. *Ib.*

AGENT — *Continued.*

5. Long continued silence gives rise to a presumption of ratification. *Ib.*

6. One acting as the agent of another in perfecting title to a mining lode, who paid no part of the purchase price, owned no individual interest, and conveyed with no covenant of warranty, is not estopped, after his agency ceased, from conveying any other or different title which he thereafter acquired to the premises in controversy. *Consolidated R. M. M. Co. v. Lebanon M. Co.*, 343.

ALIMONY:

1. An order allowing temporary alimony and counsel fees is such a final order or decree as may be appealed from under the code. *Daniels v. Daniels*, 138.

2. Although the statute makes no provision for alimony except as an incident to proceedings for divorce, this does not preclude the court from granting temporary or permanent alimony in a proper case, although a decree for divorce is not included in the relief prayed for. *Ib.*

3. To entitle a wife to alimony *pendente lite*, and for means to prosecute her suit, her petition should establish a *prima facie* case, and be supported by verification and affidavits; but the merits of the original or main controversy cannot be inquired into on such a petition. *Ib.*

APPEAL:

1. In a chancery proceeding it is proper for the clerk of the lower court, on an appeal, to certify up to this court, under section 22 of the present appeal statute, the written testimony, the depositions, and all other evidence and papers offered or used as evidence; the original pleadings and all other papers affecting the substantial rights of the parties which were used or offered at any step in the cause, save in perfecting the appeal; the record entries come up by transcript. *Metzler v. James*, 115.

2. Whether the cause be in the nature of an action at law or suit in chancery, in order to transfer it to the docket of this court, the clerk of the lower court, under section 9 of the statute, must transmit a transcript of the judgment or order appealed from, or so much thereof as is mentioned in the notice of appeal; also a transcript of the notice of appeal, together with proof of service thereof, and a transcript of the appeal bond. *Ib.*

3. Where the defendant applies to the county court to fix the time within which an appeal bond shall be filed, and the plaintiff's attorney is present and participates in the discussion, it is not error for the district court to refuse to dismiss the appeal on the ground that no written notice was served on the plaintiff's attorney. *Allenspach v. Wagner*, 127.

4. In taking an appeal the first essential act, without which it will have no validity, is the filing of the notice thereof. Unless the filing of the notice either precedes or is contemporaneous with the service thereof, it will be ineffectual. *Daniels v. Daniels*, 138.

5. An order allowing temporary alimony and counsel fees is such a final order or decree as may be appealed from under the code. *Ib.*

6. In cases of appeal from the county to the district court, under section 500 of the General Statutes, it is the duty of the district court, when properly requested, to permit defective appeal bonds, which have been approved by the county judge, to be amended, or to permit the filing of new bonds, and a refusal so to do is error subject to review by this court. *Wheeler v. Kuhns*, 196.

APPEAL — *Continued.*

7. Under the statute the right of appeal from the county to the district court is conferred only upon the party against whom the judgment has been rendered. *Todd et al. v. De La Mott*, 222.

8. A bill of exceptions which is neither signed nor sealed by the judge cannot be considered on appeal. *Laffey et al. v. Chapman*, 304.

9. The jury are the judges of the credibility of witnesses, and the supreme court will not review their findings upon questions of fact unless they are palpably against the weight of the evidence. *Oppenheimer v. D. & R. G. R. Co.*, 320.

10. In an action to recover damages for the wrongful act of the defendant, where the jury return a verdict for the defendant, objections to the instructions of the court relative to the measure of damages in case the jury should find for the plaintiff will not be considered upon appeal. *Ib.*

11. An appeal to a district court is rightly dismissed for failure of the appellant to cause a transcript of the proceedings below to be filed in the district court within the time required by a rule of the said court, notwithstanding that the statute authorizing the appeal prescribes no time within which the transcript shall be transmitted to the appellate court. *Kasson v. Follett*, 348.

12. Where a judgment has been rendered more than thirty days prior to the first day of the next term of the supreme court, appellant is not bound, under the act of 1885, to serve notice of appeal twenty days before such term, and file and docket the cause by the third day of such term, or procure an extension of the time for cause; he has the two months given by section 6 of the act within which to take his appeal. *Simonton v. Rohm*, 402.

13. Where an appeal is taken by the board of county commissioners in an action against them, the appeal bond must be executed in the name of the board, and not by the members individually. *Com'rs Boulder Co. v. King*, 542.

14. On appeal from a county court to a district court where the bond is insufficient, and the courts grant time to file an additional bond, if the new bond is adjudged insufficient, whether the appellant shall have further time to file a third bond rests in the sound discretion of the court, and on appeal such discretion will not be interfered with, except upon substantial and apparent grounds of abuse. *Ib.*

15. Where the bill of exceptions on appeal from the county court is merely a statement of the proceedings, not signed by the county judge, it does not form a part of the record, and cannot be considered. *Gumm v. Metz*, 580.

16. Errors in admitting oral testimony to vary a written instrument will not be noticed on appeal, unless the evidence is sent up with the record. *Wilson v. Gerhardt*, 535.

17. Plaintiff obtained judgment against defendant in a justice's court on two promissory notes. The case was appealed to the county court, and defendant asked leave to file his affidavit denying the genuineness of the signatures to the notes, which defense he did not make before the justice. The county court denied the application and refused to consider the affidavit as a paper in the case. *Held* error, as there are no pleadings in cases appealed from justices of the peace, and the affidavit properly raised the issue of the genuineness of the signatures. *Assig v. Pearsons*, 587.

See PRACTICE IN CRIMINAL CASES, 4-9.

APPROPRIATIONS: See CONSTITUTIONAL LAW, 22-27.

ARBITRATION — COMPULSORY:

Section 8 of article XVIII of the constitution neither contemplates nor admits of a law providing for the compulsory submission of differences to arbitration. 629.

ASSESSORS:

1. The rule governing the allowance of claims by the board of county commissioners is that the authority must be found in the statutes, either in express words or by fair implication. *Roberts v. The People*, 458.
2. The compensation for every legitimate charge against the county is not fixed by statute, nor even expressly provided for, but it is within the functions of the board of county commissioners, in such cases, to allow reasonable compensation. *Ib.*
3. The provisions of the statute for the appointment of deputy assessors are a recognition by the general assembly that assistance for the assessor may become a necessity, and, when it does, it will constitute a proper charge against the county. *Ib.*
4. It not being through any neglect or default of the assessor that the county was not divided into districts which would have authorized him to appoint deputies instead of clerks, it would be inequitable to require the assessor to bear the expenses thus necessarily incurred. Having paid the clerks, the assessor's right to reimbursement, although not covered by the express terms of the statute, may be fairly implied therefrom, also the power of the commissioners to allow the claim. *Ib.*

ASSIGNMENTS:

1. When goods in the hands of an assignee are attached by a creditor of the assignor, and the assignee interpleads, he is deemed to admit *prima facie* the legal possession of the attaching creditor, and the burden is upon the interpleading claimant to show a superior title in himself. *Burr et al. v. Clement et al.*, 1.
2. In the absence of statutory prohibition, an assignor has the right to make such provision for the payment of attorney's fees for the necessary and proper execution of the trust; he may appoint an attorney, even his own attorney, assignee. *Ib.*
3. Though the law does not favor preferences, it tolerates them, and in the absence of interdicting statutes, a debtor has the right to make preferences in respect to his creditors. *Ib.*
4. A necessary consequence of all assignments is to hinder and delay creditors to a certain extent. *Ib.*
5. The hindering and delaying meant by the law as vitiating an assignment is that hindrance and delay intended to be produced by the assignor through covin and malice, or for his own benefit and advantage. *Ib.*
6. In such cases the question of fraudulent intent is a question of fact and not of law, but the court is not deprived of the power to pronounce the judgment of the law in any case upon the facts disclosed, whenever the duty so to do becomes apparent. *Ib.*
7. Whenever an assignment contains provisions which are calculated *per se* to hinder and delay or defraud creditors, although the fraud must be passed upon as a question of fact, it nevertheless becomes the duty of the court to set aside the finding if in opposition to the plain inference to be drawn from the face of the instrument. *Ib.*
8. It may be considered a settled doctrine that voluntary assignments for the benefit of creditors, which are valid in the state where the owners reside, will be held to pass personal property in-

ASSIGNMENTS — *Continued.*

cluded, the *situs* of which is in other states. *Campbell v. Colorado C. & I. Co.*, 60.

9. Section 68 of the General Statutes relates to general assignments for the benefit of creditors, and does not prevent the making of partial assignments by insolvent debtors. *Ib.*

10. So long as the debtor retains dominion over his property, in the absence of statute and of fraud, he may transfer, incumber or dispose of it as he pleases. *Ib.*

11. Under the statute, section 68, where a debtor makes an assignment of part of his property for the benefit of creditors generally, and at or about the same time conveys, by separate instruments, the balance thereof, either as payment or security, to particular creditors, and the circumstances are such as to indicate that he may thereby have attempted an evasion of the statute above mentioned in so far as it relates to preferences, yet that portion of the transaction represented by the assignment, if in and of itself not tainted with fraud, may stand. The statute, in such case, could operate only to invalidate the preferences given, in an action brought by and against the proper parties. *Ib.*

12. The principle that a deed which is partly void, as against the provisions of a statute, or as against the common law, is void altogether, has no application to a case like the one at bar. *Ib.*

13. Section 1520 of the General Statutes, relating to the conveyance of chattels for the grantor's benefit, refers to cases where the use or trust for the grantor is the principal purpose accomplished by the conveyance, and not merely an incident thereto. *Ib.*

14. A voluntary transfer by a debtor to one of his creditors of certain horses and mules and wagons used by him at his saw-mill, in trust to sell the same, and to apply the proceeds in payment of certain preferred creditors, the balance being accepted by the assignee in settlement of his own claim, is not void as to other creditors under the statute (Gen. St. § 1523), where a bill of sale of the property was executed by the debtor, and delivered to the assignee, and formal possession of the property surrendered to him one day, and the property removed by the assignee from the mill the next. In replevin by such assignee against creditors who attached the property after it had been removed from the mill, *held* error to take the case from the jury. *Bailey v. Johnson*, 365.

15. In an action by an assignee under an assignment for the benefit of creditors, an allegation by defendant in his answer that the assignment was not *bona fide*, but was in fraud of creditors, where defendant does not allege that he is a creditor of the debtor, or held any relation to him that would entitle him to call in question the *bona fides* of the assignment, is not pertinent to the issue of defendant's indebtedness. *James v. McPhee*, 486.

16. In an action by an assignee under an assignment for the benefit of creditors for goods sold and delivered after the assignment, the defendant cannot plead an indebtedness of the assignor as a set-off. *Ib.*

17. The cashier of an unincorporated bank, who is also a partner, and is alone authorized to transact all the business, and in whose name contracts are habitually made for the bank, may become by virtue of such a contract the trustee of an express trust, and under the code may sue thereon in his own name. *Merchants' Bank v. McClelland*, 608.

18. An antecedent debt may constitute good and sufficient consideration for the contract of assignment in connection with a negotiable instrument. *Ib.*

ASSIGNMENTS — *Continued.*

19. The rule that the assignee of a negotiable instrument for value in good faith before maturity may recover against the maker is not affected by the circumstance that such assignee is in possession of facts sufficient to arouse suspicion, and is negligent in not pursuing such information to discover the fraud or illegality to which the facts may seem to point. *Ib.*

20. The expression "due course of trade" is said to be when the holder has given for the note his money, goods or credit at the time of receiving it, or has on account of it incurred some loss or liability. *Ib.*

ATTACHMENT:

1. Property in the hands of the marshal under a writ of attachment from the federal court cannot be interfered with by the sheriff under process from a state court, though the possession of the marshal be wrongful and not by virtue of a proceeding *in rem*. But where the consent of the federal court to proceed in the state court against the marshal is first obtained the rule is otherwise. *Smith v. Bauer*, 380.

2. The question of comity involved in such cases is not jurisdictional. *Ib.*

ATTORNEY:

1. An attorney is liable to be removed from office by this court for sufficient reason and on proper showing. This reason and this showing are not necessarily limited to criminal offenses, or to an act which would create a civil liability. *People ex rel. v. Green*, 506.

2. Neither the letter nor the spirit of the attorney's privilege permits him to enter our courts and spread upon the judicial records charges of a shocking and felonious character against brother attorneys, and against judges engaged in the administration of justice, upon mere rumors coupled with facts which should of themselves create no suspicion of official corruption in a just and fair mind. *Ib.*

ATTORNEY'S LIEN:

1. After notice to the judgment debtor of a *bona fide* transfer of the judgment, the rights of the assignee will be protected from any and all acts of the parties. *Boston & C. S. Co. v. Pless*, 112.

2. The statutory lien upon a judgment for the benefit of the attorney is a security of which he may avail himself or not, to obtain fees remaining due him and unpaid. *Ib.*

3. The judgment debtor being a stranger to the contract for fees between the judgment creditor and his attorney, the former is entitled to notice before being charged with liability for fees of such attorney; nor is such debtor obliged to take notice by virtue of the statute that the attorney will claim the benefit of the lien thereby provided for. *Ib.*

BANK:

1. A bank with which a note is deposited by the payee, for collection, cannot refuse to return the note, or its proceeds, to the depositor, on the ground that it was given to defraud creditors of a third person, unless the bank itself is one of those creditors. *First Nat. Bank v. Leppel*, 594.

2. To hold a bank with which a note is deposited, for collection, as garnishee, with respect to said note, a special notice is necessary, specifying the note in question as the property of a person other than the depositor. *Ib.*

BAWDY-HOUSES: See CHARTERS OF DENVER.

BILL OF EXCEPTIONS:

1. A bill of exceptions which is neither signed nor sealed by the judge cannot be considered on appeal. *Laffey et al. v. Chapman*, 804.
2. Where an appellant tenders his bill of exceptions to the judge within the time limited by the order of the court for its preparation, it is a sufficient compliance with the order, although the judge does not sign it within the specified time. *Swem v. Green*, 858.
3. The file-mark on a bill of exceptions, showing the date of its presentation to the judge, is a part of the record. *Ib.*
4. Where the bill of exceptions on appeal from the county court is merely a statement of the proceedings, not signed by the county judge, it does not form a part of the record, and cannot be considered. *Gumm v. Metz*, 580.
5. This court will not review a judgment appealed from on the evidence unless the bill of exceptions contains all the evidence. *First Nat. Bank v. Leppel*, 594.

BILL OF SALE:

The recording of a bill of sale, the law not requiring or authorizing the recording of such instruments, is no notice to creditors of the vendor. *Bassinger v. Spangler*, 175.

BONDS:

The board of county commissioners adjudged the bond of a justice of the peace insufficient, and refused to approve the same. Proceedings were instituted for a writ of *mandamus* to compel the board to approve the sureties. *Held*, that *mandamus* would not lie to control the board's discretion in the matter; it being authorized by statute (section 1942, Gen. Laws) to judge of the sufficiency of official bonds of this character. *Arapahoe County v. Crotty*, 318.

BOND ON APPEAL: See APPEAL, 13, 14.

BOUNDARY LINES:

Monuments control courses, and a specific course will control a general course. The legislature, in defining a boundary line, having given a starting point upon the Continental divide, and thence to proceed "northerly on said summit," *held*, that by the words "thence in a northerly direction on said summit" the legislature intended a continuous line, following the course of the summit of the range upon which they had established a starting point, and that it was a call for a specific course. *Grand County v. Larimer County*, 268.

CERTIFICATE:

The certificate of the acknowledging officer may, in some cases, be impeached for fraud, duress or gross concurrent mistake, but the proof must be clear, strong, convincing, and by disinterested witnesses. *Chivington v. Colorado Springs Co.*, 597.

CERTIFICATE OF LOCATION:

1. The federal and state laws are substantially the same in requiring that a recorded certificate of location of a mining claim must, among other things, contain such a description as shall identify the claim with reasonable certainty. *Drummond v. Long*, 588.

CERTIFICATE OF LOCATION — *Continued.*

2. The intention of the statutes is to give one seeking the *locus* of a recorded claim something in the nature of an initial point from which to start. The identification must be by reference to some natural object or permanent monument. *Ib.*

CHARTERS OF DENVER:

1. The original charter and various amended charters of Denver, where not referring to expressly enumerated constitutional inhibitions, are not obnoxious to the constitutional provision dealing with local or special legislation. *Rogers v. People*, 450.

2. It was competent for the legislature to confer upon the city authorities exclusive control over the subject of prohibiting and suppressing bawdy-houses, and such exclusive control having been given, a party cannot be indicted and tried under the general law of the state, such power having been accepted by the enactment of an ordinance covering the offense. *Ib.*

3. The repeal or suspension of the general law thus effected within the city producing, as it does, a disturbance in the territorial jurisdiction of the criminal courts, is not obnoxious to the constitutional provision relating to the uniformity of jurisdiction, etc., of courts of the same class or grade. *Ib.*

CHATTEL MORTGAGE:

1. Where a chattel mortgage covers a stock of goods, and the mortgagor is permitted to remain in possession by the terms of the mortgage, and is allowed by the mortgagee to sell the goods in the regular course of trade, and retain the proceeds to his own use, the mortgage is void as to other creditors of the mortgagor. *Wilson v. Voight et al.*, 614.

2. In such case possession taken by the mortgagee under the mortgage does not protect property against attachment by another creditor. *Ib.*

3. The fact that the mortgage includes other property besides merchandise does not change the result. The instrument being void in part is void altogether. *Ib.*

CHATELS — SALE OF: See STATUTE OF FRAUDS, 9-13, 14.

CITIES AND TOWNS:

1. Cities and towns incorporated under Gen. St. ch. 109, p. 953, are invested with exclusive control over their streets, and come within the rule which holds such cities and towns liable for damages caused by a failure to keep their streets in a safe condition for travel, whether such liability is specifically imposed by the act of incorporation or not. *City of Boulder v. Niles*, 415.

2. In an action against a city to recover damages for a personal injury received by the plaintiff by falling on the defendant's sidewalk, owing to the negligence of defendant in not removing ice and snow which had formed a ridge thereon, the question whether the defendant should have known of such obstruction, and removed it, is one for the jury to determine from all the circumstances,—the extent of the snow-fall, condition of the weather thereafter, amount of travel on the street, and the lapse of time between the snow-fall and the accident. *Ib.*

3. In such case, an instruction which states that, if the jury believe that plaintiff was injured owing to the negligence of the defendant in not removing an obstruction on its sidewalk which plaintiff may have proven was there, they may find for plaintiff, is errone-

CITIES AND TOWNS—*Continued.*

ous, in that it does not require them to find that plaintiff was using ordinary care in walking on such sidewalk; and the fact that the law on the subject was correctly given in another instruction is not material, as it cannot be known by which instruction the jury was governed. *Ib.*

4. In order to hold a city liable for an injury received by falling over an obstruction on its sidewalk, it must be shown, not only that there was such an obstruction, and that plaintiff was injured thereby, as alleged, without negligence on his part, but also that defendant had notice of such obstruction, or that it had existed for such a length of time as to import notice; and that defendant had not used reasonable diligence in removing such obstruction. *Ib.*

COMITY BETWEEN COURTS:

1. Property in the hands of the marshal under a writ of attachment from the federal court cannot be interfered with by the sheriff under process from a state court, though the possession of the marshal be wrongful and not by virtue of a proceeding *in rem*. But where the consent of the federal court to proceed in the state court against the marshal is first obtained the rule is otherwise. *Smith v. Bauer*, 380.

2. The question of comity involved in such cases is not jurisdictional. *Ib.*

COMMON CARRIER:

Before a common carrier may sell, under the statute, perishable freight to satisfy charges thereon, he must give the owner or consignee, or the agent of either of them, at least twenty-four hours' notice previous to such sale. *Martin v. McLaughlin*, 153.

COMPROMISE:

1. Where goods deposited with a warehouseman were stolen, and the depositor demanded payment for them from him, and he finally agreed to pay a less sum than that claimed, in settlement, but paid only a part of it, and suit was brought for the balance, *held*, that it was immaterial to the issue that he was not originally liable as warehouseman, the suit being brought upon the compromise agreement. *Suem v. Green*, 358.

2. A compromise of a doubtful right is sufficient foundation for an agreement, and it is no defense to say that it was without consideration. *Ib.*

COMPUTATION OF TIME:

1. In the computation of time prescribed by constitutional or statutory provisions for the performance of official acts, the general rule is that fractions of a day are not to be noticed, but each fraction is to be considered in the computation as a full day. *Senate Resolution*, 632.

2. When the law requires an act to be performed within a given number of days from a day mentioned, the rule is to include one of the two days mentioned and to exclude the other. *Ib.*

3. In case of administrative and judicial acts, if the return day of a writ, the completion of service by publication, or the day upon which court is to sit, falls upon a Sunday, the return day or court day is continued and becomes the Monday succeeding, unless the same should be a legal holiday. In such class of cases there can be no curtailment of the full period of time allowed by law. *Ib.*

CONDEMNATION PROCEEDINGS:

1. The deposit as security for possession under the statute, pending condemnation proceedings, cannot be used in a subsequent condemnation proceeding by the same petitioner and for a portion of the same premises, the damages suffered by respondent through the first proceeding not having been determined and paid. *Denver & N. O. R. R. Co. v. Lamborn*, 119.

2. This court cannot take original jurisdiction of condemnation proceedings. *Ib.*

3. That portion of section 242 of the code, which provides for preliminary possession and use of property pending condemnation proceedings, is not open to objection under section 15, article II, of the constitution. *McClain v. The People*, 190.

4. The right of temporary possession is not as of course. It is the duty of the judge before granting the order to investigate and determine, first, whether the preliminary possession is needful, and secondly, what sum will be a sufficient deposit to cover the award when made. *Ib.*

5. In proceedings to condemn a right of way for a railroad the title of one named in the petition as respondent to the land sought to be taken is admitted unless it is expressly denied, and the averment by respondent of title to property not covered by the petition will entitle him to damages in respect thereto, if such averment is not denied. *G., B. & L. Ry Co. v. Haggart et al.*, 346.

6. Eight hundred dollars held not an excessive award against a railroad company for taking a strip of land, about nine hundred feet in length, across two patented mill-sites, and a right of way over a lode claim. *Ib.*

CONSIDERATION:

1. In this state a pre-existing indebtedness is a sufficient consideration to support a purchase of real estate, either at private or judicial sale, and the person so purchasing will be regarded as a *bona fide* purchaser. Such transactions are, however, subject to the same tests as to good faith and regularity generally as are other contracts and sales. *McMurtrie v. Riddell*, 497.

2. A deed of land which is executed before a judgment is rendered against the owner, but is not recorded until after a judicial sale of the land is had under the judgment, and the sheriff's certificate of sale is recorded, though recorded before the recording of the sheriff's deed, at the expiration of the period of redemption, will not, under Gen. St. § 215, avail against the purchaser at the judgment sale without notice; the record of the sheriff's deed relates back to the record of the certificate of sale. *Ib.*

CONSTITUTIONAL LAW:

1. Whether a court is considering an agreement between parties, a statute or a constitution, with a view to its interpretation, that which the court seeks is the thought which the instrument expresses. To ascertain this the first resort in all cases is to the natural signification of the words employed in the order of grammatical arrangement in which the framers of the instrument have placed them. *People ex rel. v. May*, 80.

2. Seeking the meaning of section 6, article XI, of the state constitution, from the words there used, and giving these words their plain and ordinary signification, it is a fair analysis of the section to say that it consists of two leading declarations of legislative will, with exceptions to each: "That no county shall contract any debt by loan in any form," except, etc.; "that the aggregate amount of

CONSTITUTIONAL LAW — *Continued.*

indebtedness of any county, for all purposes, exclusive of debts contracted before the adoption of the constitution, shall not exceed at any time" a certain rate, except, etc. While these two propositions are associated, they are none the less independent declarations. *Ib.*

3. Having fixed a lawful margin of indebtedness, the intention of the framers of the constitution was that the annual county tax should meet the annual county expenditure. *Ib.*

4. Where no ambiguity or doubt appears in the law, the court should confine its attention to the law, and not allow extrinsic circumstances to introduce a difficulty where the language is plain. Contemporary construction can never abrogate the text, fritter away its obvious sense, narrow down its true limitations, nor enlarge its natural boundaries. *Ib.*

5. Antecedent mischief is not essential to support a constitutional limitation, or an intent to limit. The multitudinous restraints of all constitutions proceed largely against possible mischiefs. *Ib.*

6. This court will take judicial notice of the proceedings of the constitutional convention recorded in their journals and deposited in the archives of the department of state by order of the convention. *Ib.*

7. While the ultimate inquiry is always the intent of the people who adopted the constitution, the intention of its framers is an associated inquiry. *Ib.*

8. Under the constitution the limitation of debts being applicable to all debts, irrespective of their form, it follows that, in determining the amount of county indebtedness at any time, county warrants are to be taken into the account, and any warrant which increases the indebtedness over and beyond the limit fixed is in violation of the constitutional provision, and void. *Ib.*

9. County authorities, as well as parties dealing with them, must take notice of the limit which the people in their constitution have prescribed for county indebtedness. No plea of ignorance or hardship can be allowed to prevail. *Ib.*

10. Where the title of a statute contains but one general subject, the addition in the title of subdivisions under that subject does not render the act obnoxious to objection under section 21, article V, of the constitution. *Clare v. The People*, 122.

11. That portion of section 242 of the code which provides for preliminary possession and use of property pending condemnation proceedings is not open to objection under section 15, article II, of the constitution. *McClain v. The People*, 190.

12. The right of temporary possession is not as of course. It is the duty of the judge before granting the order to investigate and determine, first, whether the preliminary possession is needful, and secondly, what sum will be a sufficient deposit to cover the award when made. *Ib.*

13. Under the constitution the principal jurisdiction of the supreme court is first appellate, and second superintending. But there is also conferred upon it a limited original jurisdiction. *Wheeler v. N. C. Irrigation Co.*, 248.

14. The phrase, "and other original and remedial writs," in section 8, article VI, of the constitution, includes writs belonging to the same class as those specifically named in said section. *Ib.*

15. All of the writs referred to in said section 8, save the writ of injunction, were prerogative writs of the common law, and the writ of injunction as therein provided for is made a *quasi* prerogative writ. *Ib.*

CONSTITUTIONAL LAW — *Continued.*

16. Some of the writs mentioned, including *mandamus*, have been largely shorn, in this country, of their prerogative character. But original jurisdiction over these writs should be taken by this court only in cases involving questions *publici juris*, and the writs from this court should in general be put only to prerogative uses. Except in cases presenting some peculiar exigency they should only issue when the interest of the state at large is directly involved, and where such interest is the principal and not a collateral question. *Ib.*

17. Cases where these writs issue from this court should be brought in the name of the people, and it is the better practice that they be instituted by the attorney-general, or with his consent, or that his refusal to act or to consent be shown. *Ib.*

18. The legislature has no constitutional power to provide by law that the terms of the district court of a single county shall be held every year at a place designated in the act, which is not and never has been the county seat of such county. *Coulter v. Routt County*, 258.

19. A juror who attends a court at a place where there was no legal authority for holding such court is not entitled to his fees. *Ib.*

20. When a statute is adjudged to be unconstitutional it is as if it had never been. And what is true of an act void *in toto* is true also as to any part of an act which is found to be unconstitutional. *Ib.*

21. That part of section 193 of the Code of Civil Procedure authorizing the clerk to enter judgment upon a referee's report is not, as an attempt to make the finding of the referee the finding of the court without its submission to the court, a violation of article 6, section 1, of the state constitution relative to the judicial power. *Terpening v. Holton*, 306.

22. The limitation imposed upon county indebtedness by section 6, article XI, of the constitution, includes debts incurred by operation of law as well as those arising from express contracts. *People ex rel. v. May*, 404.

23. This constitutional provision deals with indebtedness that springs from express or implied contracts, and not with involuntary liability arising *ex delicto*. *Ib.*

24. The constitutional inhibition applies only to indebtedness; that instrument does not limit county authorities in the levy of taxes for county purposes. *Ib.*

25. Though a municipal corporation be indebted to the constitutional limit, valid appropriations of its revenue may be made in anticipation of the collection thereof to meet the ordinary expenses of the current fiscal year. *Ib.*

26. But such appropriations can only be made by orders upon the incoming revenue, given and accepted as payment; the effect of the transaction must be that of an assignment without recourse. *Ib.*

27. Under the funding statute the county authorities may provide for warrants previously presented to the treasurer for payment and duly registered, constituting valid debts, and thus be enabled to use all of the current general revenue in discharging the current expenses. *Ib.*

28. The case of *Potter v. Douglass*, relied upon by the petitioner, construes constitutional provisions which limit the amount of *taxation* as well as of indebtedness. *Ib.*, 414.

29. Judgments obtained upon void warrants by reason of a failure to plead the constitutional limitation, have, in some instances, been protected where collaterally attacked, upon the proposition

CONSTITUTIONAL LAW — *Continued.*

that the question of the validity of such warrants was *res adjudicata*. *Ib.*

80. Under the constitution of this state (art. 10, § 11), providing that, when the assessed value of property in the state shall have reached \$100,000,000, the tax for "state purposes" shall not exceed four mills per dollar of valuation, rates of taxation for state purposes aggregating five and seventeen-thirtieths mills per dollar, declared after the assessed value of property in the state had reached \$100,000,000, are in excess of the constitutional limit, although only four mills thereof is declared to be for state purposes, and the remainder is for the support of state institutions authorized by the constitution. *People ex rel. v. Scott*, 422.

81. Any legitimate expenditure of the state, necessary to be provided for by a state tax, is a "state purpose," and the tax to be provided is a tax for a "state purpose." *Ib.*

82. The act of April 7, 1885, declaring a tax of four mills for state purposes, does not repeal by implication Gen. St. §§ 15, 2243, 2444, 2881, 3108, 3167, 3456, declaring rates of taxation for various state institutions, but those rates should be extended in separate columns of the tax list, and deducted from the aggregate rate of four mills, and the remainder of that rate extended in the column of the list in which assessments for taxes to be applied to the expenses of the state government are placed. *Ib.*

83. Constitutions are adopted as a whole, and it is a rule of construction that a clause which, standing by itself, might seem of doubtful import, may be made plain by comparison with other sections of the same instrument. *Ib.*

84. Legal presumptions are in favor of the correctness of contemporaneous legislative expositions of a constitutional provision, but such construction can never abrogate the text, it can never narrow its true limitations, nor enlarge its natural boundaries. *Ib.*

85. The original charter and various amended charters of Denver, where not referring to expressly enumerated constitutional inhibitions, are not obnoxious to the constitutional provision dealing with local or special legislation. *Rogers v. People*, 450.

86. It was competent for the legislature to confer upon the city authorities exclusive control over the subject of prohibiting and suppressing bawdy-houses, and such exclusive control having been given, a party cannot be indicted and tried under the general law of the state, such power having been accepted by the enactment of an ordinance covering the offense. *Ib.*

87. The repeal or suspension of the general law thus affected within the city producing, as it does, a disturbance in the territorial jurisdiction of the criminal courts, is not obnoxious to the constitutional provision relating to the uniformity of jurisdiction, etc., of courts of the same class or grade. *Ib.*

CONTINUANCE:

The judge of a court cannot reasonably be required to postpone the business of his court in order to suit the convenience of lawyers who may desire to attend the sessions of other courts. *Roberts v. The People*, 458.

CONTRACTS:

1. This court cannot proceed upon conjecture, and by implication add a provision to a lease which defeats the leasehold estate granted by express terms. *Randolph, Adm'r, v. Helps*, 29.

2. It is a familiar rule that extrinsic evidence is not admissible, either to contradict, add to, subtract from, or vary the terms of a

CONTRACTS — *Continued.*

written instrument. The rule applies with greater force to all instruments required, by the statute of frauds, to be in writing. *Ib.*

8. As to a writing not within the statute of frauds, where the effect of a defeasance is claimed for a provision in an instrument, the same rule applies. *Ib.*

4. Where the words of a contract are free from ambiguity in themselves, and no doubt or difficulty arises as to their meaning or application, they are to be construed and applied in their plain and general acceptance. *Ib.*

5. All oral negotiations or stipulations between the parties which preceded or accompanied the execution of the instrument are to be regarded as merged in it, and the latter is to be treated as the exclusive medium of ascertaining the agreement to which the contractors bound themselves. Parol evidence is admissible to explain and apply the writing, but not to add to it or vary its terms. *Ib.*

6. The law holds a contracting party liable as for a fraud on his express representations concerning facts material to the treaty, the truth of which he assumes to know, and the truth of which is not known to the other contracting party, where the representations were false, and the other party, relying upon them, has been misled to his injury. *Stimson v. Helps*, 33.

7. Fraud is the term which the law applies to certain facts, and where upon the facts the law adjudges fraud, it is not essential that the complaint should in terms allege it. It is sufficient if the facts stated amount to a case of fraud. *Ib.*

8. A contract of separation of man and wife must be untainted by fraud, and the contract must be fair and reasonable, considering the circumstances of the parties. *Daniels v. Daniels*, 133.

9. At common law a married woman, though living apart from her husband, could not make a binding contract except for necessities or for the benefit of her separate estate; this rule was not changed by statute until 1872. *Farrand v. Beshoar*, 291.

10. In equity, before the statutes of 1872 and 1874, the written contract of a married woman, for the benefit of other persons, was not a charge upon her separate estate unless it contained an express provision to that effect. *Ib.*

11. A contract to cut, cure and stack hay on a ranch, at so much per ton, which does not specify what number of tons are to be cut, nor any given number of acres to be mowed, and under which neither the work to be done nor the amount to be paid is in gross, is a separable, not an entire, contract; and, where the hay is burned, the loss falls on the owner, and the contractor, being innocent, can recover for his labor notwithstanding. *Hindrey v. Williams*, 371.

12. In such a case it is a fatal defect in a defense which attempts to show that the hay was not well stacked, and had to be restacked by defendant, to fail to show that defendant paid any given sum for the restacking, or that it was worth any given amount. *Ib.*

13. Where a contract by which plaintiff agreed to cut, cure and stack hay on defendant's ranch contains a stipulation that the hay shall be measured within thirty days, and defendant fails to measure it, and it is burned, he is estopped by such default from alleging, by way of defense to plaintiff's claim, that the hay had not been measured. *Ib.*

14. Where the statute of frauds was pleaded to an alleged contract for the sale of goods, and no note or memorandum in writing having been made and subscribed by the parties, and no part of the

CONTRACTS — *Continued.*

goods, or the evidence of them, having been accepted and received by the purchaser, nor any part of the purchase money paid at the time of the transaction, *held*, that the contract of sale was within the statute, and void. *Billin v. Henkel*, 394.

15. A void contract, under the statute, may not be rendered valid by performance on the part of one party only; the vendee must not only receive but accept the goods bargained for, in order to pass the title. *Ib.*

16. Where two persons enter into a contract, the one to prospect for the discovery of mining claims, and the other to furnish the necessary money, provisions, etc., and do the discovery work on claims found, attend to the surveys, sink shafts, and file certificates of location, etc., such a contract, having been partly performed on both sides, cannot be regarded as rescinded, unless the circumstances show an absolute abandonment of the contract as to future enterprises. Proof of negotiations for an abandonment is insufficient to establish a rescission. The parties cannot treat the contract as binding and rescinded at the same time. *Chadbourne v. Davis*, 581.

CONTRACTOR: See LIENS, 5, 6.

CONTRIBUTORY NEGLIGENCE:

If the plaintiff so far contributes to the injury by his own conduct as that, but for such conduct, the injury would not have been received, he cannot recover. *Wells v. Coe*, 159.

CONVEYANCE:

If a grantor duly acknowledges an instrument conveying land, and authorizes its delivery, he cannot afterwards avoid the same on the ground that his signature thereto was forged. *Chivington v. Colorado Springs Co.*, 597.

CORPORATIONS:

1. In an action against a corporation the plea of *ultra vires* is not to be understood as an absolute and peremptory defense in all cases of excess of power without regard to other circumstances and considerations. The plea is not to be entertained when its allowance will do great wrong to innocent third persons. *Denver Fire Ins. Co. v. McClelland*, 11.

2. If a private corporation has accepted and retained the full benefit of a contract which it had no power to make, the same having been fully performed by the other party thereto, and if the transaction is of such a nature that the party thus performing will suffer manifest hardship and injustice, unless permitted to maintain his action directly upon the contract, no other adequate relief being at his command, the defense of *ultra vires* may be disallowed. *Ib.*

3. In an action against the directors of a corporation brought under Gen. St. 184, section 16, making directors jointly and severally liable for the corporation debts for the preceding year, on their failure to file the report of debts and capital required by the statute, the complaint is bad if it fails to aver that the corporation was doing business in the county in the recorder's office of which it claims the report should have been filed, to set out the contract of indebtedness on which the action is brought, the default of the corporation, and the directorship of the defendants, as of such dates as to show the liability of the defendants under the statute. *Anfenger et al. v. Anzeiger Pub. Co.*, 377.

COUNTY CLERK:

1. Ample authority is conferred by the statute on the county clerk to administer all oaths necessary to be administered in matters pertaining to the business and duties of his office, and also to administer oaths generally. *Roberts v. The People*, 458.

2. The statutes provide for the appointment of deputy clerks and their qualification, and it necessarily follows that a deputy is authorized to administer all oaths proper to be administered and taken in the transaction of official business pertaining to the office of county clerk, and in performing the functions of clerk thereof. *Ib.*

COUNTY COMMISSIONERS:

The board of county commissioners adjudged the bond of a justice of the peace insufficient, and refused to approve the same. Proceedings were instituted for a writ of *mandamus* to compel the board to approve the sureties. *Held*, that *mandamus* would not lie to control the board's discretion in the matter; it being authorized by statute (section 1942, Gen. Laws) to judge of the sufficiency of official bonds of this character. *Arapahoe County v. Crotty*, 818.

COUNTY GOVERNMENT:

1. The rule governing the allowance of claims by the board of county commissioners is that the authority must be found in the statutes, either in express words or by fair implication. *Roberts v. The People*, 458.

2. The compensation for every legitimate charge against the county is not fixed by statute, nor even expressly provided for, but it is within the functions of the board of county commissioners, in such cases, to allow reasonable compensation. *Ib.*

3. The provisions of the statute for the appointment of deputy assessors are a recognition by the general assembly that assistance for the assessor may become a necessity, and, when it does, it will constitute a proper charge against the county. *Ib.*

4. It not being through any neglect or default of the assessor that the county was not divided into districts, which would have authorized him to appoint deputies instead of clerks, it would be inequitable to require the assessor to bear the expenses thus necessarily incurred. Having paid the clerks, the assessor's right to reimbursement, although not covered by the express terms of the statute, may be fairly implied therefrom, also the power of the commissioners to allow the claim. *Ib.*

COUNTY INDEBTEDNESS:

1. The limitation imposed upon county indebtedness by section 6, article XI, of the constitution, includes debts incurred by operation of law as well as those arising from express contracts. *People ex rel. v. May*, 404.

2. This constitutional provision deals with indebtedness that springs from express or implied contracts, and not with involuntary liability arising *ex delicto*. *Ib.*

3. The constitutional inhibition applies only to indebtedness; that instrument does not limit county authorities in the levy of taxes for county purposes. *Ib.*

4. Though a municipal corporation be indebted to the constitutional limit, valid appropriations of its revenue may be made in anticipation of the collection thereof to meet the ordinary expenses of the current fiscal year. *Ib.*

COUNTY INDEBTEDNESS — Continued.

5. But such appropriations can only be made by orders upon the incoming revenue, given and accepted as payment; the effect of the transaction must be that of an assignment without recourse. *Ib.*

6. Under the funding statute the county authorities may provide for warrants previously presented to the treasurer for payment and duly registered, constituting valid debts, and thus be enabled to use all of the current general revenue in discharging the current expenses. *Ib.*

7. The case of *Potter v. Douglass*, relied upon by the petitioner, construes constitutional provisions which limit the amount of taxation as well as of indebtedness. *Ib.*, 414.

8. Judgments obtained upon void warrants by reason of a failure to plead the constitutional limitation, have, in some instances, been protected where collaterally attacked, upon the proposition that the question of the validity of such warrants was *res adjudicata*. *Ib.*

COUNTY OFFICERS: See COUNTY GOVERNMENT.

COUNTY TREASURERS:

1. Under section 30, article V, of the constitution, the legislature may fix the commencement of the term of office of county treasurers. *House Bill*, 631.

2. The power to fill a vacancy in such office is lodged in the board of county commissioners by section 9, article XIV, of the constitution. *Ib.*

COURSES:

Monuments control courses, and a specific course will control a general course. The legislature, in defining a boundary line, having given a starting point upon the Continental divide, and thence to proceed "northerly on said summit," held, that by the words "thence in a northerly direction on said summit" the legislature intended a continuous line, following the course of the summit of the range upon which they had established a starting point, and that it was a call for a specific course. *Grand County v. Larimer County*, 268.

COURTS — TERMS OF: See DISTRICT COURTS.

COURT OF APPEALS:

1. The judicial power, both appellate and original, lodged by the constitution in the supreme court, cannot be transferred to another court created by the legislature in any manner so as to make its decisions final. *Senate Bill*, 628.

2. All laws relating to courts shall be general and of uniform operation throughout the state. *Ib.*

CREDITORS: See ASSIGNMENTS.

CREDITOR'S BILL:

1. Where a bill is brought to set aside a conveyance, it is in the nature of a creditor's bill, and cannot be maintained before judgment. *Neuman v. Dreifurst*, 228.

2. A bill will not lie by a judgment creditor for discovery, and to have land in another county than that in which the judgment was rendered, alleged to be held in trust for the judgment debtor, who is

CREDITOR'S BILL — Continued.

residing on such land, made subject to the judgment, where the judgment has not been made a lien upon the land claimed to be subjected by filing a transcript of the judgment with the recorder of the county in which the land is situated. *Barnes v. Beighly*, 475.

8. On a creditor's bill seeking to have property alleged to have been purchased with the money of a judgment debtor, and to be held in trust for him, made subject to a judgment, where the defendants charged with collusion answer on oath denying the charges, and such denials are not contested by the plaintiff by any evidence contradictory of the statements therein, but by a general denial, it is error to enter judgment in favor of the plaintiff. *Ib.*

4. In a suit by a judgment creditor for discovery, and in aid of a judgment previously recovered by the same plaintiff, in which defendant alleges that the original judgment is still in force and unsatisfied, and charges collusion with defendant's wife, made co-defendant, in transferring his property to her name, it is error for the court to give a general judgment against both defendants for the amount of the defendant's debt. *Ib.*

5. In a suit for discovery, and in aid of a judgment, in the nature of a creditor's bill, by a judgment creditor, it is error to enter judgment against the debtor, and a co-defendant charged with collusion, for the amount of the former's debt. *Ib.*

CRIMINAL JURISPRUDENCE:

The principle is recognized in criminal jurisprudence that proof of certain facts may lead irresistibly to the presumption that another act, of which there is no direct proof, was committed or done. *Roberts v. The People*, 458.

CROSS-VEINS:

1. Under sections 2322, 2336, R. S. U. S., where a junior mining location crosses a senior location, and the veins therein are cross-veins, the junior locator is entitled to all the ore found on his vein within the side line of the senior location, except at the space of intersection of the two veins. In such a case the junior locator has a right of way for the purpose of excavating and taking away the mineral contained in the cross-vein. *Lee v. Stahl*, 208.

2. The effect of the provisions of section 2336, R. S. U. S., is to exclude a cross-lode, except at the point of lode intersection, as not a subject of grant. Being exempt from the grant, the right to it is not lost by failure to "adverse." But this does not include the space of a lode intersection. If a prior locator would secure this and other rights which he has by virtue of his prior location, he must adverse, whether his prior location was made under the act of 1866 or 1872. A failure to assert prior rights is treated as a waiver. *Ib.*

DAMAGES:

1. In general if a voluntary act, lawful in itself, may naturally result in the injury of another, or the violation of his legal rights, the actor must at his peril see to it that such injury or such violation does not follow or he must expect to respond in damages therefor; and this is true regardless of the motive or the degree of care with which the act is performed. *G., B. & L. Ry Co. v. Eagles*, 544.

2. But such injury must be the proximate consequence of the act complained of. And if there be no intermediate efficient cause the act must be considered as reaching to the effect. *Ib.*

DAMAGES — Continued.

8. Where damages claimed result through the frightening away of guests from plaintiff's hotel by the blasting of defendant, evidence of injuries to adjacent buildings, caused by rocks cast upon them through such blasting, is competent as bearing upon the reasonableness of the fears of injury entertained by such guests. *G., B. & L. Ry Co. v. Doyle*, 549.

See CITIES AND TOWNS; MUNICIPAL CORPORATIONS.

DEBTOR AND CREDITOR: See ASSIGNMENTS.

DEMAND:

Where the defendant, in an action of replevin before a justice of the peace, has contested the case upon the merits, on a claim of a superior right to the property, and the judgment has been given against him, he cannot maintain on appeal that, as an innocent purchaser, replevin will not lie against him without a demand and his refusal to deliver up the property; a demand is not necessary where the defendant claims the same right, both as to ownership and possession, as the plaintiff claims, and that his right is derived from the same source. *Lamping v. Keenan*, 390.

DEPOSITIONS:

Under section 379 of the code all objections to the manner of certifying and returning a deposition are waived unless presented before the trial. *Walker v. Steel*, 383.

DISBARMENT:

1. An attorney is liable to be removed from office by this court for sufficient reason and on proper showing. This reason and this showing are not necessarily limited to criminal offenses or to an act which would create a civil liability. *People ex rel. v. Green*, 506.

2. Neither the letter nor the spirit of the attorney's privilege permits him to enter our courts and spread upon the judicial records charges of a shocking and felonious character against brother attorneys, and against judges engaged in the administration of justice, upon mere rumors coupled with facts which should of themselves create no suspicion of official corruption in a just and fair mind. *Ib.*

DISTRICT COURTS:

1. The legislature has no constitutional power to provide by law that the terms of the district court of a single county shall be held every year at a place designated in the act, which is not and never has been the county seat of such county. *Coulter v. Routt County*, 258.

2. A juror who attends a court at a place where there was no legal authority for holding such court is not entitled to his fees. *Ib.*

3. When a statute is adjudged to be unconstitutional it is as if it had never been. And what is true of an act void *in toto* is true also as to any part of an act which is found to be unconstitutional. *Ib.*

DITCHES:

Where the several owners of two irrigating ditches entered into an agreement to construct a new ditch to supersede the old ditches, and, upon the trial of the question what proportion of water carried through the new ditch each one was entitled to, it appeared by

DITCHES — Continued.

the weight of evidence that nothing was said in the agreement about the division of the water, *held*, that the decree of the court adjudging that each party to the agreement was entitled to the same share of the water conveyed through the ditch as he owned of the new ditch itself was erroneous, as being against the weight of evidence. *Held, further*, that the finding of the court that the appropriations of water by the different parties were to be referred to the date of the contract respecting the new ditch, was erroneous, it not appearing that priorities had been waived by the contract respecting the new ditch. *Rominger v. Squires*, 327.

DOUBTFUL CLAIM: See COMPROMISE.**DUE-BILLS:**

1. Due-bills and promissory notes are regulated, and the legal effect thereof determined, by statute in this state and not by the *lex mercatoria*. *Lee v. Balcom*, 216.

2. An instrument for the payment of money, in the following form:

“DECEMBER 20, 1882.

“Due P. Balcom the sum of two hundred and fifty dollars, value received, with interest at ten per cent. per annum after four months from date.

“GEORGE S. LEE,

“M. J. LEE, per GEORGE S. LEE,”

Held to be, in legal effect, a promissory note, and due and payable at the time of its execution. *Ib.*

“DUE COURSE OF TRADE:” See TRUSTS, 10.**EJECTMENT:**

1. The statute of limitations is a good defense in ejectment, but under the present practice it must be specially pleaded in this as in other actions, or the defense is waived. *Chivington v. Colorado Springs Co.*, 597.

2. When plaintiff has legally parted with his title and right to occupy, he cannot recover in ejectment, even though defendant's paper title be fatally defective. *Ib.*

3. If a grantor duly acknowledges an instrument conveying land, and authorizes its delivery, he cannot afterwards avoid the same on the ground that his signature thereto was forged. *Ib.*

EMINENT DOMAIN:

1. The deposit as security for possession under the statute, pending condemnation proceedings, cannot be used in a subsequent condemnation proceeding by the same petitioner and for a portion of the same premises, the damages suffered by respondent through the first proceeding not having been determined and paid. *Denver & N. O. R. Co. v. Lamborn*, 119.

2. This court cannot take original jurisdiction of condemnation proceedings. *Ib.*

3. That portion of section 242 of the code which provides for preliminary possession and use of property pending condemnation proceedings is not open to objection under section 15, article II, of the constitution. *McClain v. The People*, 190.

4. The right of temporary possession is not as of course. It is the duty of the judge before granting the order to investigate and determine, first, whether the preliminary possession is needful, and

EMINENT DOMAIN—*Continued.*

secondly, what sum will be a sufficient deposit to cover the award when made. *Ib.*

5. In proceedings to condemn a right of way for a railroad the title of one named in the petition as respondent to the land sought to be taken is admitted unless it is expressly denied, and the averment by respondent of title to property not covered by the petition will entitle him to damages in respect thereto, if such averment is not denied. *G. B. & L. Ry Co. v. Haggart et al.*, 346.

6. Eight hundred dollars held not an excessive award against a railroad company for taking a strip of land, about nine hundred feet in length, across two patented mill-sites, and a right of way over a lode claim. *Ib.*

ERROR:

1. Upon writ of error, error cannot be assigned on an order made after judgment. *Polk v. Butterfield*, 325.

2. Errors in admitting oral testimony to vary a written instrument will not be noticed on appeal, unless the evidence is sent up with the record. *Wilson v. Gerhardt*, 585.

EVIDENCE:

1. It is a familiar rule that extrinsic evidence is not admissible, either to contradict, add to, subtract from, or vary the terms of a written instrument. The rule applies with greater force to all instruments required, by the statute of frauds, to be in writing. *Randolph, Adm'r, v. Helps*, 29.

2. As to a writing not within the statute of frauds, where the effect of a defeasance is claimed for a provision in an instrument, the same rule applies. *Ib.*

3. Where the words of a contract are free from ambiguity in themselves, and no doubt or difficulty arises as to their meaning or application, they are to be construed and applied in their plain and general acceptance. *Ib.*

4. All oral negotiations or stipulations between the parties which preceded or accompanied the execution of the instrument are to be regarded as merged in it, and the latter is to be treated as the exclusive medium of ascertaining the agreement to which the contractors bound themselves. Parol evidence is admissible to explain and apply the writing, but not to add to it or vary its terms. *Ib.*

5. An action to determine an adverse claim to a placer claim, and to recover a designated portion thereof, is not sustained by proof of a mere easement in the plaintiff over the premises in controversy. *Rockwell v. Graham*, 36.

6. A right of way for a flume to conduct water is such an easement as is protected by the federal statutes, and is not ground for an adverse claim to the land. *Ib.*

7. Where parties stipulate in open court as to their respective sources of title, evidence in contradiction thereof is inadmissible. *Ib.*

8. Where land is described in several deeds in different terms, parol evidence to identify the premises as being one and the same is admissible. *Ib.*

9. That an agency may be proved by the habit and course of dealing between the parties is clear upon principle and authority. *Higgins v. Armstrong*, 88.

10. Under the statute of frauds of this state the same evidence is necessary as under the statute of 29 Car. II., c. 3, to establish a trust. *Bohm v. Bohm*, 100.

EVIDENCE — *Continued.*

11. Where the description of the property contained in the sheriff's return of levy, and other documents following thereon, is in such general terms as to call for evidence *dehors* the writing, parol evidence is admissible to apply it to the subject-matter, and thereby clear up any uncertainty; and if from such evidence it appears that the terms used, as commonly understood in the neighborhood, clearly designate the property levied upon and sold, the description must be regarded as sufficient. *Laughlin v. Hawley*, 170.

12. Upon proof of the death of the sheriff, the existence of an execution issued to him while alive may be shown by testimony (1) that in the execution docket in the custody of the clerk of court there was an absence of entry for two years, covering the time of the issue of the execution in question, but that the fee-book mentions "execution issued January 8, 1878," and also the entering the sheriff's return without date; (2) that such execution was seen in the hands of the sheriff, and, by the latter's permission, examined by the party testifying. *Bruns v. Clase*, 225.

13. Proof of a diligent and *bona fide*, but unsuccessful, search for an instrument in the place where the same belongs, is generally kept, or is most likely to be found, is sufficient to admit secondary evidence of its contents. *Ib.*

14. Where no provision is made in a written agreement that the indebtedness of a party should be secured by a lien on his or her interest in the property, evidence of a contemporaneous parol agreement to that effect is inadmissible. *Neuman v. Dreifurst*, 228.

15. Evidence of threats made after the confession of accused is *clearly inadmissible*. *Kollenberger v. The People*, 233.

16. Evidence of the contents of a deed is not admissible until the fact of its loss has been established. *Terpening v. Holton*, 306.

17. Where the proof already offered has revealed that the sale of a mining claim relied upon was evidenced by a written instrument, the party relying upon the sale must produce the writing, or account for its absence, and evidence of a parol sale is not admissible. *Ib.*

18. Parol evidence of the contents of a writing is admissible upon proof of the loss of the writing. *Oppenheimer v. D. & R. G. R. Co.*, 320.

19. Where the plaintiff sues for damages for wrongful ejectment from a train upon which he was traveling by virtue of a mileage ticket, and the defendant pleads that the ticket was issued upon the condition, of which plaintiff had notice, that it was not available over that portion of the road upon which he was traveling, evidence that the defendant had sold the same kind of ticket to another person about the time of the sale to plaintiff, and that such ticket was used without objection by the company, is inadmissible. *Ib.*

20. Before secondary evidence can be given of an instrument in writing, there must be proof of a diligent and *bona fide*, but unsuccessful, search for such instrument in the place where the same belongs, is generally kept, or most likely to be found. *Billin et al. v. Henkel et al.*, 394.

21. The principle is recognized in criminal jurisprudence that proof of certain facts may lead irresistibly to the presumption that another act, of which there is no direct proof, was committed or done. *Roberts v. The People*, 458.

22. It is not enough that the evidence of the plaintiff shows a case that calls for some relief; to entitle himself to judgment he

EVIDENCE — Continued.

must show himself entitled to the relief called for by the facts stated in the complaint. The allegations of the complaint, the evidence and the finding should correspond in legal intent. *Miller v. Hallock*, 551.

28. The certificate of the acknowledging officer may, in some cases, be impeached for fraud, duress or gross concurrent mistake, but the proof must be clear, strong, convincing, and by disinterested witnesses. *Chivington v. Colorado Springs Co.*, 597.

EXEMPTION:

If a judgment debtor having two wagons, one of which he is entitled to exempt from execution, conceals one, and claims the other as exempt, his selection and claim of the other is fraudulent, and a levy thereon by the sheriff is no ground for recovery under the statute (sec. 84, Gen. St. p. 602) making an officer who levies on exempt property liable in three times the value of the property. *Yates v. Gransbury*, 323.

FALSE PRETENSES:

1. In prosecutions for obtaining money or property under false representations it is held not to be essential to constitute the offense charged that the pretenses by which the money or property is obtained were made directly to the party defrauded. *Roberts v. The People*, 458.

2. Where the evidence corresponds with the indictment in its general design and purport a technical variance will not be fatal. *Ib.*

FEES: See DISTRICT COURTS, 2.

FORCIBLE ENTRY AND DETAINER:

Where an action of forcible entry and detainer has been so altered, by striking out a part of the complaint, as to resolve it into an action for possession and damages, and the appellee obtained, and is maintaining, a decree obtained in the latter form, he cannot object that, being originally framed as an action of forcible entry and detainer, the court has no jurisdiction on appeal. *Mullen v. Wine*, 167.

FRAUD:

1. The law holds a contracting party liable as for a fraud on his express representations concerning facts material to the treaty, the truth of which he assumes to know, and the truth of which is not known to the other contracting party, where the representations were false, and the other party, relying upon them, has been misled to his injury. *Stimson v. Helps*, 33.

2. Fraud is the term which the law applies to certain facts, and where upon the facts the law adjudges fraud, it is not essential that the complaint should in terms allege it. It is sufficient if the facts stated amount to a case of fraud. *Ib.*

3. Under the statute (Gen. Stats. sec. 2174), bills for relief on the ground of fraud must be filed within three years after the discovery, by the aggrieved party, of the facts constituting such fraud, and not afterwards. *Bohm v. Bohm*, 100.

4. Where the defendant alleged in her cross-complaint that she did not discover the fraud upon which she sought relief until within three years of the filing of the cross-complaint, the allegation standing unimpeached, the original transaction being between a mother and her son, and under other circumstances stated in the cross-complaint, held, on demurrer, that the case made by the cross-complaint was not barred by the statute of limitations. *Ib.*

FRAUD — Continued.

5. Whenever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the party so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed. *Ib.*

6. A court will not inquire into a fraud except at the instance of the party injured by it. *Allenspach v. Wagner*, 127.

FREIGHT:

Before a common carrier may sell, under the statute, perishable freight to satisfy charges thereon, he must give the owner or consignee, or the agent or either of them, at least twenty-four hours' notice previous to such sale. *Martin v. McLaughlin*, 153.

GAMING:

1. Horse-racing is gaming, within the intent of section 850, General Statutes of Colorado, and a wager upon a horse-race is a gaming contract, and "utterly void and of no effect." *Corson v. Neatheny*, 212.

2. The authority of the stakeholder to pay the money to the winner, upon the contingency, may be revoked by either party before payment, and thereafter the stakeholder holds the deposit to the use of the depositor, who may maintain an action for its recovery. *Ib.*

GARNISHEE:

To hold a bank with which a note is deposited, for collection, as garnishee, with respect to said note, a special notice is necessary, specifying the note in question as the property of a person other than the depositor. *First Nat. Bank v. Leppel*, 594.

GUEST:

1. An innkeeper is bound to take extraordinary care. His responsibility approximates to insurance whenever the thing brought to the inn has been confided, expressly or by implication, to his keeping. *Murray v. Marshall*, 482.

2. Where a guest, on leaving a hotel, without the intention of returning as a guest, but without paying his bill, leaves his valise in the charge of the hotel clerk, and returns within forty-eight hours, the innkeeper is liable as a bailee for want of ordinary care, and the loss of the valise raises a presumption of negligence against him. *Ib.*

HOMICIDE: See MURDER.**HORSE-RACING:**

1. Horse-racing is gaming, within the intent of section 850, General Statutes of Colorado, and a wager upon a horse-race is a gaming contract, and "utterly void and of no effect." *Corson v. Neatheny*, 212.

2. The authority of the stakeholder to pay the money to the winner, upon the contingency, may be revoked by either party before payment, and thereafter the stakeholder holds the deposit to the use of the depositor, who may maintain an action for its recovery. *Ib.*

HUSBAND AND WIFE:

A contract of separation of man and wife must be untainted by fraud, and the contract must be fair and reasonable, considering the circumstances of the parties. *Daniels v. Daniels*, 188.

INDIAN RESERVATION:

A mining location made tortiously upon an Indian reservation before the Indian title is extinguished will not avail against a location made after the land is opened for settlement. *Kendall v. San Juan S. M. Co.*, 849.

INDORSEMENT: See PROMISSORY NOTES.

INJUNCTION BOND:

1. In an action on an injunction bond to recover damages for loss of plaintiff's crops by reason of his being restrained from using the water in a certain ditch, the evidence showed that there was a great scarcity of water, and that it could not have reached plaintiff's land, whereupon a verdict for nominal damages was rendered. *Held*, that such verdict would not be disturbed. *Mack v. Jackson*, 536.

2. Where a party sues for damages caused by being restrained from using the water from a certain ditch, if it is shown that he could have obtained sufficient water from another source, he will not be entitled to receive a greater sum than he would have had to expend to obtain water from such source. *Ib.*

INNKEEPER:

1. An innkeeper is bound to take extraordinary care. His responsibility approximates to insurance whenever the thing brought to the inn has been confided, expressly or by implication, to his keeping. *Murray v. Marshall*, 482.

2. Where a guest, on leaving a hotel, without the intention of returning as a guest, but without paying his bill, leaves his valise in the charge of the hotel clerk, and returns within forty-eight hours, the innkeeper is liable as a bailee for want of ordinary care, and the loss of the valise raises a presumption of negligence against him. *Ib.*

INSTRUCTIONS:

1. Where the evidence in a criminal case is wholly circumstantial, it is error to instruct the jury that they need not be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt. *Clare v. The People*, 122.

2. A charge containing two conflicting propositions of law upon a material point, one correct and the other incorrect, must be held erroneous, it being impossible to determine upon which proposition the jury relied. *Ib.*

3. To prevent reversal for error in the charge, it must appear that the prisoner could not have been prejudiced thereby. *Ib.*

4. Where the uncontradicted evidence of the plaintiff fails to show such a compliance with the statute as would sustain a verdict in his favor, it is proper for the court to direct a verdict for the defendant. *Bassinger v. Spangler*, 175.

5. Instructions to the jury are required by statute to be in writing. *Lee v. Stahl*, 208.

6. It is the duty of the court to make any and all corrections of the instructions, when reduced to writing, necessary to their validity. *Rice v. Goodridge*, 287.

INSTRUCTIONS — *Continued.*

7. Where a party stipulates that written instructions may not be given to the jury prior to the arguments, as provided by statute, cannot be heard, upon appeal, to found any complaint upon a right thus waived. *Ib.*

8. An instruction which is not based upon facts in evidence, nor upon the pleadings, may be ground for reversal. *Rara Avis G. & S. M. Co. v. Bouscher*, 885.

See MURDER, 8, 7; CITIES AND TOWNS, 3.

INSURANCE:

1. The insurance statute of Colorado contains no provision requiring mutual assurance associations to have or to accumulate a capital or reserved fund, beyond the amount necessary to defray current losses and expenses. Nor does it specify any particular method by which such companies shall make contracts and take risks. This subject is left to be determined by the association itself; the only limitation being that the plan chosen must include the principle of mutuality. *Spruance v. Farmers' & M. Ins. Co.*, 73.

2. The principle of mutuality exists when the persons constituting the company contribute either cash or assessable premium notes, or both, as the plan of transacting business may provide, to a common fund, out of which each is entitled to indemnity in case of loss. It is perfectly consistent with this principle to transact business upon the plan of full paid cash premiums. *Ib.*

3. But the superintendent of insurance has almost unlimited power in the investigation of the affairs and management of these companies. *Ib.*

INTEREST:

1. Unless the tender of a sum admitted to be due be unconditional, interest may be recovered thereon. *Higgins v. Armstrong*, 88.

2. Mere delay on the part of the stakeholder to pay over the money is not of itself such "unreasonable and vexatious delay" as will warrant the allowance of interest, under last clause of section 1707, General Statutes of Colorado. *Corson v. Neatheny*, 212.

3. In the absence of a provision in a written contract to pay interest at the rate of two per cent. per month, statutory interest only can be recovered. *Neuman v. Dreifurst*, 228.

INTERPLEADER: See ASSIGNMENTS, 1.

IRRIGATION:

It could not have been the intention of section 2, article VI, of the constitution as amended in 1885, to authorize an *ex parte* adjudication of individual or corporate rights by means of a legislative or executive question submitted to the supreme court, nor to exact in response to a legislative inquiry a wholesale exposition of all constitutional provisions relating to a given general subject, in anticipation of the possible introduction or passage of measures bearing upon particular branches of such subjects. *Senate Resolution*, 620.

JUDGMENT:

Leave to amend a pleading is of no effect unless complied with. Judgment cannot be rendered for items not set forth in the pleadings. *Briggs v. Bruce*, 282.

See CONSTITUTIONAL LAW, 21.

JUDGMENT CREDITOR:

1. A bill will not lie by a judgment creditor for discovery, and to have land in another county than that in which the judgment was rendered, alleged to be held in trust for the judgment debtor, who is residing on such land, made subject to the judgment, where the judgment has not been made a lien upon the land claimed to be subjected by filing a transcript of the judgment with the recorder of the county in which the land is situated. *Barnes v. Beighly*, 475.

2. On a creditor's bill seeking to have property alleged to have been purchased with the money of a judgment debtor, and to be held in trust for him, made subject to a judgment, where the defendants charged with collusion answer on oath denying the charges, and such denials are not contested by the plaintiff by any evidence contradictory of the statements therein, but by a general denial, it is error to enter judgment in favor of the plaintiff. *Ib.*

3. In a suit by a judgment creditor for discovery, and in aid of a judgment previously recovered by the same plaintiff, in which defendant alleges that the original judgment is still in force and unsatisfied, and charges collusion with defendant's wife, made co-defendant, in transferring his property to her name, it is error for the court to give a general judgment against both defendants for the amount of the defendant's debt. *Ib.*

4. In a suit for discovery, and in aid of a judgment, in the nature of a creditor's bill, by a judgment creditor, it is error to enter judgment against the debtor, and a co-defendant charged with collusion, for the amount of the former's debt. *Ib.*

JUDGMENT DEBTOR:

If a judgment debtor having two wagons, one of which he is entitled to exempt from execution, conceals one and claims the other as exempt, his selection and claim of the other is fraudulent, and a levy thereon by the sheriff is no ground for recovery under the statute (sec. 34, Gen. St., p. 602) making an officer who levies on exempt property liable in three times the value of the property. *Yates v. Gransbury*, 323.

JUDICIAL SALE:

1. In this state a pre-existing indebtedness is a sufficient consideration to support a purchase of real estate, either at private or judicial sale, and the person so purchasing will be regarded as a *bona fide* purchaser. Such transactions are, however, subject to the same tests as to good faith and regularity generally as are other contracts and sales. *McLurtrie v. Riddell*, 497.

2. A deed of land which is executed before a judgment is rendered against the owner, but is not recorded until after a judicial sale of the land is had under the judgment, and the sheriff's certificate of sale is recorded, though recorded before the recording of the sheriff's deed at the expiration of the period of redemption, will not, under Gen. St., § 215, avail against the purchaser at the judgment sale without notice; the record of the sheriff's deed relates back to the record of the certificate of sale. *Ib.*

JURISDICTION:

1. Under the constitution the principal jurisdiction of the supreme court is first appellate, and second superintending. But there is also conferred upon it a limited original jurisdiction. *Wheeler v. N. C. Irrigation Co.*, 248.

2. The phrase, "and other original and remedial writs," in section 3, article VI, of the constitution, includes writs belonging to the same class as those specifically named in said section. *Ib.*

JURISDICTION — Continued.

8. All of the writs referred to in said section 3, save the writ of injunction, were prerogative writs of the common law, and the writ of injunction as therein provided for is made a *quasi* prerogative writ. *Ib.*

4. Some of the writs mentioned, including *mandamus*, have been largely shorn, in this country, of their prerogative character. But original jurisdiction over these writs should be taken by this court only in cases involving questions *publici juris*, and the writs from this court should in general be put only to prerogative uses. Except in cases presenting some peculiar exigency they should only issue when the interest of the state at large is directly involved, and where such interest is the principal and not a collateral question. *Ib.*

5. Cases where these writs issue from this court should be brought in the name of the people, and it is the better practice that they be instituted by the attorney-general, or with his consent, or that his refusal to act or to consent be shown. *Ib.*

See CONSTITUTIONAL LAW, 87.

JURISDICTION OF JUSTICES OF THE PEACE:

Under section 8, article II, of the constitution, the general assembly may provide for prosecuting misdemeanors before justices of the peace, upon sworn complaint or other information. *House Bill 158*, 625.

JURORS:

A juror who attends a court at a place where there was no legal authority for holding such court is not entitled to his fees. *Coulter v. Routt County*, 258.

JURY:

In civil cases, the court, on the recording of the verdict, may allow or refuse the jury to be polled, in his discretion; but, if there should be any good reason, a request by either party to test the unanimity of the jury by a poll should be allowed. *Hindrey v. Williams*, 871.

LARCENY:

1. Section 22 of "An act to provide for the branding, herding and care of stock" (paragraph 8190, Gen. St.) is part of a special act, the effect of which is not to take a larceny of any of the animals out of the provisions of the general act, but to leave it indictable under either act. *Kollenberger v. The People*, 283.

2. The words in an indictment "the same being living animals" may be rejected as surplusage. *Ib.*

LEASE:

1. A covenant to pay rent is not personal but runs with the land; the grantee of the reversion stands in the same position to the tenant that the lessor did before he parted with the reversion. *Allenspach v. Wagner*, 127.

2. Where a tenant holds a lease which is to expire upon the sale of the leased premises, and the new owner under a sale of the land offers to continue him as tenant, under the lease, the tenant cannot recover damages for an eviction by the grantee, the eviction being in consequence of the non-payment of rent under the lease. *Ib.*

3. Nor is it sufficient in such case for the tenant to say that the sale was fraudulent and void. A court will not inquire into a fraud except at the instance of the party injured by it. *Ib.*

LEASE — Continued.

4. A release is not to be implied from the mere fact of assent to the assignment of a lease, and the assignment of a lease does not annul the lessee's obligation on his express covenants to pay rent, even though the lessor has accepted the assignee as his tenant, and collected rent from him. *Wilson v. Gerhardt*, 585.

See **CONTRACTS**.

LEGISLATIVE CONSTRUCTION: See **TAXATION**, 5.

LIENS:

1. After notice to the judgment debtor of a *bona fide* transfer of the judgment, the rights of the assignee will be protected from any and all acts of the parties. *Boston & C. S. Co. v. Pless*, 112.

2. The statutory lien upon a judgment for the benefit of the attorney is a security of which he may avail himself or not, to obtain fees due him and remaining unpaid. *Ib*.

3. The judgment debtor being a stranger to the contract for fees between the judgment creditor and his attorney, the former is entitled to notice before being charged with liability for fees of such attorney, nor is such debtor obliged to take notice by virtue of the statute that the attorney will claim the benefit of the lien thereby provided for. *Ib*.

4. Under Gen. St. §§ 58-60, pp. 266, 267, a lien upon the real estate of a judgment debtor is created by filing a transcript of a judgment from a justice of the peace with the county clerk and recorder, no duty being placed upon the recorder to index and record such transcript. *Laughlin v. Hawley*, 170.

5. The expression "due or to become due under the contract," used in section 1657 of the General Laws (1877), entitles the subcontractor to be paid out of moneys that may become due the contractor for labor or materials furnished by other persons subsequent to the subcontractor's lien notice, but under the same principal contract. *Tabor v. Armstrong*, 285.

6. The subcontractor is not entitled to a lien for expense incurred through idleness enforced by the default or negligence of the principal contractor. *Ib*

LIFE INSURANCE:

A policy of life insurance contained a provision that if the insured should become so far intemperate as to impair his health, or induce *delirium tremens*, it should become void. The insured allowed the policy to become forfeited, but, being indebted to the plaintiff, he transferred it to him, and the plaintiff arranged with the president of the company for its revival, and paid the sums required to keep the policy in force until the insured's death, which happened shortly after the revival. The president of the company knew the habits of the deceased at the time of the revival, and that he had become so intemperate as to injure his health. *Held*, that the knowledge of the president must be regarded as the knowledge of the company; that the company was bound by his acts in permitting the revival or renewal of the policy, and that the plaintiff could recover under the policy. *HELM, J., dissenting. Pomeroy v. R. M. I. & S. Co.*, 295.

LIMITATIONS:

1. It is not necessary that a new promise relied on to avoid the bar of the statute of limitations should be declared on in the complaint. It is sufficient to reply the new promise, after the defense of the statute is interposed. *Folk v. Butterfield*, 325.

LIMITATIONS — Continued.

2. The statute of limitations is a good defense in ejectment, but under the present practice it must be specially pleaded in this as in other actions, or the defense is waived. *Chivington v. Colorado Springs Co.*, 597.

See STATUTE OF LIMITATIONS.

MANDAMUS:

The board of county commissioners adjudged the bond of a justice of the peace insufficient, and refused to approve the same. Proceedings were instituted for a writ of *mandamus* to compel the board to approve the sureties. *Held*, that *mandamus* would not lie to control the board's discretion in the matter; it being authorized by statute (section 1942, Gen. Laws) to judge of the insufficiency of official bonds of this character. *Arapahoe County v. Crotty*, 818.

MANSLAUGHTER: See MURDER.**MARRIED WOMEN:**

1. At common law a married woman, though living apart from her husband, could not make a binding contract except for necessities or for the benefit of her separate estate; this rule was not changed by statute until 1872. *Farrand v. Beshoar*, 291.

2. In the absence of fraud, an absolute deed will not be construed as creating a constructive or resulting trust. *Ib.*

3. In equity, before the statutes of 1872 and 1874, the written contract of a married woman, for the benefit of other persons, was not a charge upon her separate estate unless it contained an express provision to that effect. *Ib.*

MASTER AND SERVANT:

1. In the purchase of safe machinery and appliances the master is required to exercise ordinary care and diligence, such care and diligence being proportioned to the dangers of the service. *Wells v. Coe*, 159.

2. The master is likewise charged with the exercise of ordinary care and diligence in keeping the machinery and appliances in suitable condition for use; such care having reference, also, to the dangers of the service. *Ib.*

3. Agents charged with the duty of procuring machinery, or with the duty of inspecting and keeping the same in suitable repair, are not to be regarded as fellow-servants with employees laboring in the business where such machinery is used. *Ib.*

4. The duty of the master, however, does not amount to an absolute guaranty of perfection in the machinery or appliances. For injuries produced through latent defects in the machinery, or through defects which the requisite skill and watchfulness had failed to detect or foresee and avoid, the master is not answerable. *Ib.*

5. Where injury is suffered by a servant through defects in the machinery furnished, if the servant knew or had means of knowledge equal to that of his employer concerning such defects, yet continues in the service, he cannot recover, provided no inducement relating to the danger led him to remain. *Ib.*

6. If the plaintiff so far contributes to the injury by his own conduct as that, but for such conduct, the injury would not have been received, he cannot recover. *Ib.*

7. In actions by employees for injuries arising from the negligence of the employer, such injuries must be the actual, natural and prox-

MASTER AND SERVANT—Continued.

mate result of the wrong committed, the legitimate sequence of the thing amiss. *Clifford v. D., S. P. & P. R. R. Co.*, 333.

8. The injury need not be anticipated in the particular case; it is sufficient if such an injury might be reasonably expected to result in the long run from a series of similar negligences. *Ib.*

9. A complaint averring that the injury resulted from sleeping several consecutive nights at the summit of the Alpine Pass, where snow storms prevailed almost continuously, on wet and frozen ground with nothing but damp spruce branches for a bed and insufficient covering, held sufficient in the foregoing respects. *Ib.*

MECHANICS' LIENS:

1. The expression "due or to become due under the contract," used in section 1657 of the General Laws (1877), entitles the subcontractor to be paid out of moneys that may become due the contractor for labor or materials furnished by other persons subsequent to the subcontractor's lien notice, but under the same principal contract. *Tabor v. Armstrong*, 235.

2. The subcontractor is not entitled to a lien for expense incurred through idleness enforced by the default or negligence of the principal contractor. *Ib.*

3. Services rendered in planning and superintending development work upon mines, and the erection of a mill and machinery, are work and labor within the meaning of the mechanic's lien statute. But not so as to labor as disbursing agent and accountant. *Rara Avis G. & S. M. Co. v. Bouscher*, 385.

4. The "incidental" labor for which liens are allowed under the statutes must be directly done for and connected with, or actually incorporated into, the building or improvement. *Ib.*

MINES:

1. Section 7, Gen. Laws Colo. p. 630, which provides that " * * * an adit of at least ten feet in, along the lode, from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft," contemplates that as to the ten feet required it might be either open or under cover, or open in part and under cover in part, dependent upon the nature of the ground. *Electro-M. M. & D. Co. v. Van Auken*, 204.

2. Services rendered in planning and superintending development work upon mines, and the erection of a mill and machinery, are work and labor within the meaning of the mechanic's lien statute. But not so as to labor as disbursing agent and accountant. *Rara Avis G. & S. M. Co. v. Bouscher*, 385.

3. The "incidental" labor for which liens are allowed under the statutes must be directly done for and connected with, or actually incorporated into, the building or improvement. *Ib.*

MINING CLAIMS:

1. An action to determine an adverse claim to a placer claim, and to recover a designated portion thereof, is not sustained by proof of a mere easement in the plaintiff over the premises in controversy. *Rockwell v. Graham*, 86.

2. A right of way for a flume to conduct water is such an easement as is protected by the federal statutes, and is not ground for an adverse claim to the land. *Ib.*

3. Under sections 2322, 2336, R. S. U. S., where a junior mining location crosses a senior location, and the veins therein are cross-

MINING CLAIMS—*Continued.*

veins, the junior locator is entitled to all the ore found on his vein within the side line of the senior location, except at the space of intersection of the two veins. In such a case the junior locator has a right of way for the purpose of excavating and taking away the mineral contained in the cross-vein. *Lee v. Stahl*, 208.

4. The effect of the provisions of section 2336, R. S. U. S., is to exclude a cross-lode, except at the point of lode intersection, as not a subject of grant. Being exempt from the grant, the right to it is not lost by failure to "adverse." But this does not include the space of a lode intersection. If a prior locator would secure this and other rights which he has by virtue of his prior location, he must adverse, whether his prior location was made under the act of 1866 or 1872. A failure to assert prior rights is treated as a waiver. *Ib.*

5. One who makes a discovery of mineral and runs a tunnel thereon, but does no other act towards completing the statutory location, and for the period of four years does no labor of any kind, acquires no interest in the vein as against intervening rights. Nor can he at the end of the four years perform the remaining acts necessary to a statutory location and have the inception of the claim date from the original discovery, there being intervening rights. *Pelican & Dives M. Co. v. Snodgrass*, 339.

6. The party who first discovers a vein and posts his discovery notice, following such acts with the remaining acts necessary to a valid location within the time prescribed by law, holds the vein as against a subsequent discoverer who succeeds in first completing all the requisite acts of location. *Ib.*

7. The relocater of an abandoned mining claim has the same length of time to perform each of the acts of location subsequent to discovery as the original locator. *Ib.*

8. One acting as the agent of another in perfecting title to a mining lode, who paid no part of the purchase price, owned no individual interest, and conveyed with no covenant of warranty, is not estopped, after his agency ceased, from conveying any other or different title which he thereafter acquired to the premises in controversy. *Consolidated R. M. M. Co. v. Lebanon M. Co.*, 343.

9. In 1865 the manner of locating lode claims in Griffith mining district, Colorado, was governed by miners' rules and customs; and, to locate and hold a claim, development work, after posting the discovery notice, was requisite. *Ib.*

10. A mining location made tortiously upon an Indian reservation before the Indian title is extinguished will not avail against a location made after the land is opened for settlement. *Kendall v. San Juan S. M. Co.*, 349.

11. The federal and state laws are substantially the same in requiring that a recorded certificate of location of a mining claim must, among other things, contain such a description as shall identify the claim with reasonable certainty. *Drummond v. Long*, 588.

12. The intention of the statutes is to give one seeking the locus of a recorded claim something in the nature of an initial point from which to start. The identification must be by reference to some natural object or permanent monument. *Ib.*

13. Before either party can recover in an "adverse" mining suit, he must show a compliance with the statutes, state and federal, and local miners' rules and regulations relating to the location of mining claims. Proof of occupancy merely will not suffice. *Becker v. Pugh*, 589.

MINING CLAIMS — Continued.

14. The miners' regulations of Gregory district, adopted in 1860, required the locator to indicate by stakes or otherwise upon the surface, the ground or the vein sought to be appropriated. *Ib.*

15. An action in the nature of ejectment is proper in support of an adverse filed in the land office. But the ordinary rules in ejectment are somewhat modified. *Ib.*

MINING PARTNERSHIP:

1. A mining partnership exists where the several owners of a mine co-operate in the working of the mine. Such partnership is governed by many of the rules relating to ordinary partnerships, but differing therefrom in many important particulars. *Higgins v. Armstrong*, 38.

2. Where a member of a mining partnership purchases articles necessary to the carrying on of the business, the debt being contracted in the usual course of business, and within the scope of the partnership venture, the individual member having authority to contract the debt, the copartners will be bound thereby. *Ib.*

MONUMENTS:

Monuments control courses, and a specific course will control a general course. The legislature, in defining a boundary line, having given a starting point upon the Continental divide, and thence to proceed "northerly on said summit," *held*, that by the words "thence in a northerly direction on said summit" the legislature intended a continuous line, following the course of the summit of the range upon which they had established a starting point, and that it was a call for a specific course. *Grand County v. Larimer County*, 268.

MUNICIPAL CORPORATIONS:

1. While a municipal corporation cannot be compelled to provide water-ways of sufficient capacity to carry off all surface waters likely to accumulate in the streets, yet such as the city has provided it is bound to keep in repair and free from obstructions, so that, up to their original capacity, they shall be efficient. *City of Denver v. Rhodes*, 554.

2. The rule that there is no implied liability for damages necessarily occasioned by the construction of a municipal improvement is subject to the qualification that a liability arises for all damages not necessarily incident to the work, and which are chargeable to the improper or unskillful manner of executing it. *Ib.*

3. A municipal corporation is required to execute the work of constructing a public improvement, such as a sewer, in a careful and skilful manner; and if, by reason of the neglect or want of skill of the persons engaged in the work, property of a citizen built with reference to an established grade is injured by surface water, the proper channels for the flow of which are obstructed, the city is liable. *Ib.*

4. The construction of a sewer, under a statute authorizing the passage of a city ordinance providing for such construction, is not a *public work* for the benefit of the people of the state, so as to shield the corporation from liability to persons whose property is damaged during the progress of the work. *Ib.*

5. When a municipality undertakes a public improvement, such as the construction of a sewer, it is bound to exercise the same degree of care and prudence that a cautious individual would do if the whole loss or risk were his own; and it is liable, like an individual, for damages resulting from negligence or omission of duty. *Ib.*

MUNICIPAL CORPORATIONS — Continued.

6. A supervisory control over the work, and the discretionary power of the contract itself, establish the relation of principal and agent between the city and its contractor. In such case the rule is that the employer is liable for the negligence or misconduct of the contractor. *Ib.*

See COUNTY INDEBTEDNESS.

MURDER:

1. Under Crim. Code, ch. 25, § 21, providing that, in cases of homicide, "malice shall be implied where no considerable provocation appears, or when the circumstances of the killing show an abandoned and malignant heart," the fact of the use of a weapon or instrument calculated to destroy life is not a necessary condition precedent to the implication; but, where an assault is made on a woman with the hands and feet only, the accused being aware, from her condition, that such an assault might prove fatal, the implication arises, and a conviction of murder or voluntary manslaughter may be had. *Murphy v. People*, 435.

2. Where, on an indictment for murder, the accused is convicted of voluntary manslaughter, he cannot be heard to say, on appeal, that such conviction is erroneous for the reason that no sufficient provocation was shown, and that under the evidence he should have been convicted of murder. *Ib.*

3. It is not error, on an indictment for manslaughter, for the court to refuse to give cumulative instructions specifying repeatedly each material ultimate fact, and telling the jury they must find, as to each, beyond a reasonable doubt. *Ib.*

4. On an indictment for murder, where there has been no attempt by the prosecution to show that the accused had ever been unkind to the deceased prior to the killing, it is not error in the court to refuse to admit cumulative evidence of acts of kindness by him. *Ib.*

5. Where a witness has testified that he is not in fear of giving his evidence, the admission of testimony by him that he was at one time in fear, though erroneous, is not ground for reversal. *Ib.*

6. On an indictment for murder, evidence that the accused repented the next day of his act, and was forgiven by the deceased, is inadmissible. *Ib.*

7. Error may not be assigned upon the refusal of the court to allow counsel for a prisoner to read the instructions of the court to the jury. Adverse comments upon instructions to the jury are not permissible. The manner and extent to which counsel may proceed in argument rests in the sound discretion of the court. *Ib.*

NECESSARIES: See CONTRACTS, 9.

NEGLIGENCE:

1. If the plaintiff so far contributes to the injury by his own conduct as that, but for such conduct, the injury would not have been received, he cannot recover. *Wells v. Coe*, 159.

2. Where, on the trial of an action for damages against a railroad company resulting from fire coming from an engine alleged to belong to defendant, the defendant denies that it operated the railroad running through plaintiff's farm, the uncontroverted evidence, by a station agent of defendant, that the defendant company ran its trains over the road running through plaintiff's farm, though not going clearly to the date of the fire; also that defendant sent him, soon after the fire, to see plaintiff respecting it, and to report con-

NEGLIGENCE—Continued.

cerning it,—is sufficient to establish the fact that defendant was operating the road at the time of the fire, and regarded itself as liable for damages. *Union P. R. R. Co. v. Jones*, 379.

NEW COUNTIES:

1. Under section 17, article V, of the constitution, a bill introduced cannot be so amended as to change its original purpose. *House Bill*, 624.

2. While the legislature may enter into an investigation to ascertain and determine the ratable proportion of existing liability to be assumed by a new county, it is eminently proper to remit the same to the appropriate local authorities under suitable legislation. *Ib.*

3. In creating a new county out of parts of one or more existing counties, under section 4, article XIV, of the constitution, the new county may be made liable for a ratable proportion of the existing liabilities of the counties out of which the new county is created. *House Bill*, 639.

NEW PROMISE:

It is not necessary that a new promise relied on to avoid the bar of the statute of limitations should be declared on in the complaint. It is sufficient to reply the new promise after the defense of the statute is interposed. *Polk v. Butterfield*, 325.

NOMINATIONS TO PUBLIC OFFICES:

The correction of abuses in the nomination of candidates for public officers is a proper subject of legislation and entirely within the legislative power. *House Bill*, 631.

NONSUIT:

Special matters constituting a good defense being set up in an answer and not being traversed may entitle the defendant to judgment of nonsuit. *Allenspach v. Wagner*, 127.

NOTARIES PUBLIC:

Under the constitution of this state qualified electors only are eligible to the office of notary public, and a bill providing for the appointment of women to such office, held to be unconstitutional. *House Bill*, 628.

NOTICE:

1. Before a common carrier may sell, under the statute, perishable freight to satisfy charges thereon, he must give the owner or consignee, or the agent of either of them, at least twenty-four hours' notice previous to such sale. *Martin v. McLaughlin*, 158.

2. The recording of a bill of sale, the law not requiring or authorizing the recording of such instruments, is no notice to creditors of the vendor. *Bassinger v. Spangler*, 175.

See AGENT.

OATHS:

1. Ample authority is conferred by the statute on the county clerk to administer all oaths necessary to be administered in matters pertaining to the business and duties of his office, and also to administer oaths generally. *Roberts v. The People*, 458.

2. The statutes provide for the appointment of deputy clerks and their qualification, and it necessarily follows that a deputy is authorized to administer all oaths proper to be administered and taken in the transaction of official business pertaining to the office of county clerk, and in performing the functions of clerk thereof. *Ib.*

PARTNER:

A partner who, upon dissolution of the firm, has become the owner of a partnership account may sue thereon in his own name under the code. *Walker v. Steel*, 388.

PARTNERSHIP:

When the same persons carry on the same business as partners in two different places, and under different firm names, there is in law but a single partnership, and the assets of both nominal firms are equally applicable to the payment of all the creditors. *Campbell v. Colorado C. & I. Co.*, 60.

See MINING PARTNERSHIP.

PLEADING:

1. In an action against a corporation the plea of *ultra vires* is not to be understood as an absolute and peremptory defense in all cases of excess of power without regard to other circumstances and considerations. The plea is not to be entertained when its allowance will do great wrong to innocent third persons. *Denver Fire Ins. Co. v. McClelland*, 11.

2. Special matters constituting a good defense being set up in an answer and not being traversed may entitle the defendant to judgment of nonsuit. *Allenspach v. Wagner*, 127.

3. To entitle a wife to alimony *pendente lite*, and for means to prosecute her suit, her petition should establish a *prima facie* case, and be supported by verification and affidavits; but the merits of the original or main controversy cannot be inquired into on such a petition. *Daniels v. Daniels*, 133.

4. After a case has gone to trial, a motion to strike defendant's answer from the files comes too late. *Martin v. McLaughlin*, 153.

5. A defendant has a right, notwithstanding his default in the county court, to file his answer in the district court upon the appeal. Gen. St. § 500. *Ib.*

6. Where an action of forcible entry and detainer has been so altered, by striking out a part of the complaint, as to resolve it into an action for possession and damages, and the appellee obtained, and is maintaining, a decree obtained in the latter form, he cannot object that, being originally framed as an action of forcible entry and detainer, the court has no jurisdiction on appeal. *Mullen v. Wine*, 187.

7. Judgment by default, without a rule to answer, should not be entered against a defendant, where a motion to strike out a portion of the complaint has been allowed. *Ib.*

8. Where the character of the action has been changed by striking out some portion of the complaint, there should be an actual amendment of the complaint in accordance with the provisions of section 58 of the code. *Ib.*

9. As a matter of good practice, an order to strike out should specify particularly and correctly the matter to be stricken from the pleading. *Ib.*

10. In an action on a promissory note under the statute (section 66, Code), a failure to verify the answer, the complaint being unverified, does not prevent a trial of all material questions properly presented, save the genuineness and due execution of the note. *Watson v. Lemen*, 200.

11. A traverse of the allegation in a complaint that the indebtedness is due, without denying the facts averred which show such maturity, is bad. *Ib.*

PLEADING — *Continued.*

12. Under our present practice there is no general denial nor general issue. Each material allegation must be specifically traversed; nor is there any formal plea in abatement. Matters in abatement, unless appearing on the face of the complaint, must be set up by answer. *Ib.*

13. Leave to amend a pleading is of no effect unless complied with. Judgment cannot be rendered for items not set forth in the pleadings. *Briggs v. Bruce*, 282.

14. In an action of unlawful detainer, where the plaintiff claimed under a decree in connection with a certificate of purchase, and the only allegation in the complaint concerning the nature or provisions of the decree was "that under and by virtue of being the owner of said certificate, and under the power and authority of the district court of said county, and the decree upon which said certificate of sale was issued, this plaintiff is entitled to the possession of said lode, with all appurtenances," held to be simply a conclusion of law, and not sufficient to constitute a cause of action. *Laffey et al. v. Chapman*, 304.

15. It is not necessary that a new promise relied on to avoid the bar of the statute of limitations should be declared on in the complaint. It is sufficient to reply the new promise, after the defense of the statute is interposed. *Polk v. Butterfield*, 325.

16. Courts do not take judicial notice of the statutes of other states. They must be set out in the pleadings and proved like other facts. *Ib.*

17. In proceedings to condemn a right of way for a railroad the title of one named in the petition as respondent to the land sought to be taken is admitted unless it is expressly denied, and the averment by respondent of title to property not covered by the petition will entitle him to damages in respect thereto if such averment is not denied. *G., B. & L. Ry Co. v. Haggart et al.*, 346.

18. Where pleadings are contradictory, and the issues are narrowed by a stipulation to issues of facts of which the court can take judicial notice, it is proper for the court to decide the case upon a motion for judgment upon the pleadings and stipulation, and it is unnecessary to assign the case for trial. The facts left in issue, being facts of which the court could take judicial notice, are deemed part of the pleadings, and not matter for evidence. *Kendall v. San Juan S. M. Co.*, 349.

19. In an action against the directors of a corporation brought under Gen. St. 184, section 16, making directors jointly and severally liable for the corporation debts for the preceding year, on their failure to file the report of debts and capital required by the statute, the complaint is bad if it fails to aver that the corporation was doing business in the county in the recorder's office of which it claims the report should have been filed, to set out the contract of indebtedness on which the action is brought, the default of the corporation, and the directorship of the defendants, as of such dates as to show the liability of the defendants under the statute. *Anzenger et al. v. Anzeiger Pub. Co.*, 377.

20. A pleading defective in a matter not jurisdictional cannot be first assailed after answer and trial. *Smith v. Bauer*, 380.

21. In an action by the assignee of a promissory note to recover on the note, the plaintiff, in stating his cause of action, omitted to state that the note sued on was due, by the terms thereof, at the time of bringing the action. The defendant interposed no objection on account of this omission till the plaintiff's testimony was closed, but pleaded that the assignment was fraudulent and

PLEADING — *Continued.*

made by the payee in order to escape a set-off which defendant had against him, and that the note was obtained through fraud, of which plaintiff had notice. *Held*, plaintiff could amend his complaint by the addition of an allegation that the note sued on was due "in six months after the day of the date thereof," and that the court could require defendant to answer such amended complaint *instante*. *Brisbots v. Lewis*, 494.

22. It is not enough that the evidence of the plaintiff shows a case that calls for some relief; to entitle himself to judgment he must show himself entitled to the relief called for by the facts stated in the complaint. The allegations of the complaint, the evidence and the finding should correspond in legal intent. *Miller v. Hallock*, 551.

23. An answer which alleges merely that defendant "has not and cannot obtain sufficient information on which to base a belief" as to whether the facts stated in the complaint are true, is objectionable. *James v. McPhee*, 486.

24. An answer which confines itself to denying *in ipso verbis* the allegations of the complaint, and does not attempt to deny their substance or spirit,—*e. g.*, a denial that *all* a debtor's property was assigned to the plaintiff suing as an assignee, or that defendant requested plaintiff to deliver the goods, the price of which is sued for,—is bad as being evasive, and tendering immaterial issues. *Ib.*

25. In an action by an assignee under an assignment for the benefit of creditors, an allegation by defendant in his answer that the assignment was not *bona fide*, but was in fraud of creditors, where defendant does not allege that he is a creditor of the debtor, or held any relation to him that would entitle him to call in question the *bona fides* of the assignment, is not pertinent to the issue of defendant's indebtedness. *Ib.*

26. An answer which is defective in itself may be cured by the plaintiff's reply, so as to raise an issue on which trial may be had, and in such case it is error to render judgment for the plaintiff on the pleadings. *Ib.*

27. In an action by an assignee under an assignment for the benefit of creditors for goods sold and delivered after the assignment, the defendant cannot plead an indebtedness of the assignor as a set-off. *Ib.*

28. Under the code, a party is entitled to such relief as his evidence, together with the facts averred in the body of his pleading, justify, regardless of the relief demanded in his prayer. *Becker v. Pugh*, 589.

See MASTER AND SERVANT, 9.

POLLING JURY: See JURY.

PRACTICE:

1. Objections to questions should specify the grounds of objection at the proper time; it is too late to make specific objections in this court. *Higgins v. Armstrong*, 38.

2. Unless the tender of a sum admitted to be due be unconditional interest may be recovered thereon. *Ib.*

3. Under the statute (Gen. Stats. sec. 2174), bills for relief on the ground of fraud must be filed within three years after the discovery, by the aggrieved party, of the facts constituting such fraud, and not afterwards. *Bohm v. Bohm*, 100.

4. Where the defendant alleged in her cross-complaint that she did not discover the fraud upon which she sought relief until

PRACTICE—Continued.

within three years of the filing of the cross-complaint, the allegation standing unimpeached, the original transaction being between a mother and her son, and under other circumstances stated in the cross-complaint, *held*, on demurrer, that the case made by the cross-complaint was not barred by the statute of limitations. *Ib.*

5. In a chancery proceeding it is proper for the clerk of the lower court, on an appeal, to certify up to this court, under section 22 of the present appeal statute, the written testimony, the depositions, and all other evidence and papers offered or used as evidence; the original pleadings and all other papers affecting the substantial rights of the parties which were used or offered at any step in the cause, save in perfecting the appeal; the record entries come up by transcript. *Metzler v. James*, 115.

6. Whether the cause be in the nature of an action at law or suit in chancery, in order to transfer it to the docket of this court, the clerk of the lower court, under section 9 of the statute, must transmit a transcript of the judgment or order appealed from, or so much thereof as is mentioned in the notice of appeal; also a transcript of the notice of appeal, together with proof of service thereof, and a transcript of the appeal bond. *Ib.*

7. Where the defendant applies to the county court to fix the time within which an appeal bond shall be filed, and the plaintiff's attorney is present and participates in the discussion, it is not error for the district court to refuse to dismiss the appeal on the ground that no written notice was served on the plaintiff's attorney. *Allenspach v. Wagner*, 127.

8. After a case has gone to trial, a motion to strike defendant's answer from the files comes too late. *Martin v. McLaughlin*, 158.

9. A defendant has a right, notwithstanding his default in the county court, to file his answer in the district court upon the appeal. Gen. St. § 500. *Ib.*

10. It is not error to allow the plaintiff to dismiss his own case, where no counter-claim has been interposed. *Denver & R. G. Ry Co. v. Copley*, 152.

11. Where an action of forcible entry and detainer has been so altered, by striking out a part of the complaint, as to resolve it into an action for possession and damages, and the appellee obtained, and is maintaining, a decree obtained in the latter form, he cannot object that, being originally framed as an action of forcible entry and detainer, the court has no jurisdiction on appeal. *Mullen v. Wine*, 167.

12. Judgment by default, without a rule to answer, should not be entered against a defendant, where a motion to strike out a portion of the complaint has been allowed. *Ib.*

13. Where the character of the action has been changed by striking out some portion of the complaint, there should be an actual amendment of the complaint in accordance with the provisions of section 58 of the Code. *Ib.*

14. As a matter of good practice, an order to strike out should specify particularly and correctly the matter to be stricken from the pleading. *Ib.*

15. Where the uncontradicted evidence of the plaintiff fails to show such a compliance with the statute of frauds as would sustain a verdict in his favor, it is proper for the court to direct a verdict for the defendant. *Bassinger v. Spangler*, 175.

16. In cases of appeal from the county to the district court, under section 500 of the General Statutes, it is the duty of the district court, when properly requested, to permit defective appeal bonds,

PRACTICE — *Continued.*

which have been approved by the county judge, to be amended, or to permit the filing of new bonds, and a refusal so to do is error subject to review by this court. *Wheeler v. Kuhns*, 198.

17. In an action on a promissory note under the statute (section 66, Code), a failure to verify the answer, the complaint being unverified, does not prevent a trial of all material questions properly presented, save the genuineness and due execution of the note. *Watson v. Lemen*, 300.

18. A traverse of the allegation in a complaint that the indebtedness is due, without denying the facts averred which show such maturity, is bad. *Ib.*

19. Under our present practice there is no general denial nor general issue. Each material allegation must be specifically traversed; nor is there any formal plea in abatement. Matters in abatement, unless appearing on the face of the complaint, must be set up by answer. *Ib.*

20. After a demurrer has been overruled, the terms upon which and the time within which the defendant shall be ruled to answer is a matter of discretion, and, except when the discretion is manifestly abused, will not be interfered with by this court. *Corson v. Neatheny*, 212.

21. Under the statute the right of appeal from the county to the district court is conferred only upon the party against whom the judgment has been rendered. *Todd v. De La Mott*, 223.

22. A motion filed after the adjournment of the court, and not acted upon, is not such an appearance as to give the court jurisdiction over the person filing the motion. *Ib.*

23. Upon proof of the death of the sheriff, the existence of an execution issued to him while alive may be shown by testimony (1) that in the execution docket in the custody of the clerk of court there was an absence of entry for two years, covering the time of the issue of the execution in question, but that the fee-book mentions "execution issued January 8, 1878," and also the entering the sheriff's return without date; (2) that such execution was seen in the hands of the sheriff, and, by the latter's permission, examined by the party testifying. *Bruns v. Clase*, 225.

24. Proof of a diligent and *bona fide*, but unsuccessful, search for an instrument in the place where the same belongs, is generally kept, or is most likely to be found, is sufficient to admit secondary evidence of its contents. *Ib.*

25. It is the duty of the court to make any and all corrections of the instructions, when reduced to writing, necessary to their validity. *Rice v. Goodridge*, 237.

26. A bill of exceptions which is neither signed nor sealed by the judge cannot be considered on appeal. *Laffey et al. v. Chapman*, 304.

27. Good practice requires that an order of reference should state whether it was made on the agreement of parties, upon the application of one party, or on the motion of the court. *Terpening v. Holton*, 306.

28. In an action in which the circumstances authorizing a compulsory reference under the Code of Civil Procedure do not exist, where the order fails to show that the reference was by consent, and it appears from the transcript that the appellant did not object to the validity of the order or the jurisdiction of the referee, either before the referee, or in court before the entry of judgment upon his report, and that he appeared before the referee, and proceeded to the trial of the matters submitted, the appellant's conduct will

PRACTICE — *Continued.*

operate as a waiver of his right to object, and the reference will be upheld on appeal. *Ib.*

29. Where a reference covers the whole issue before the court, the clerk may enter judgment upon his report without any order of the court; and previous to the act of April 10, 1885, no notice was required before doing so. *Ib.*

30. Evidence of the contents of a deed is not admissible until the fact of its loss has been established. *Ib.*

31. Where the proof already offered has revealed that the sale of a mining claim relied upon was evidenced by a written instrument, the party relying upon the sale must produce the writing, or account for its absence, and evidence of a parol sale is not admissible. *Ib.*

32. That part of section 192 of the Code of Civil Procedure authorizing the clerk to enter judgment upon a referee's report is not, as an attempt to make the finding of the referee the finding of the court without its submission to the court, a violation of article 6, section 1, of the state constitution relative to the judicial power. *Ib.*

33. The jury are the judges of the credibility of witnesses, and the court will not review their findings upon questions of fact unless they are palpably against the weight of the evidence. *Oppenheimer v. D. & R. G. R. Co.*, 320.

34. In an action to recover damages for the wrongful act of the defendant, where the jury return a verdict for the defendant, objections to the instructions of the court relative to the measure of damages in case the jury should find for the plaintiff will not be considered upon appeal. *Ib.*

35. Parol evidence of the contents of a writing is admissible upon proof of the loss of the writing. *Ib.*

36. Where the plaintiff sues for damages for wrongful ejectment from a train upon which he was traveling by virtue of a mileage ticket, and the defendant pleads that the ticket was issued upon the condition, of which plaintiff had notice, that it was not available over that portion of the road upon which he was traveling, evidence that the defendant had sold the same kind of ticket to another person about the time of the sale to plaintiff, and that such ticket was used without objection by the company, is inadmissible. *Ib.*

37. Upon writ of error, error cannot be assigned on an order made after judgment. *Polk v. Butterfield*, 325.

38. An appeal to a district court is rightly dismissed for failure of the appellant to cause a transcript of the proceedings below to be filed in the district court within the time required by a rule of the said court, notwithstanding that the statute authorizing the appeal prescribes no time within which the transcript shall be transmitted to the appellate court. *Kasson v. Follett*, 348.

39. Where pleadings are contradictory, and the issues are narrowed by a stipulation to issues of facts of which the court can take judicial notice, it is proper for the court to decide the case upon a motion for judgment upon the pleadings and stipulation, and it is unnecessary to assign the case for trial. The facts left in issue, being facts of which the court could take judicial notice, are deemed part of the pleadings, and not matter for evidence. *Kendall v. San Juan S. M. Co.*, 349.

40. Where an appellant tenders his bill of exceptions to the judge within the time limited by the order of the court for its preparation, it is a sufficient compliance with the order, although the judge does not sign it within the specified time. *Swem v. Green*, 358.

PRACTICE — Continued.

41. The file-mark on a bill of exceptions, showing the date of its presentation to the judge, is a part of the record. *Ib.*

42. In civil cases, the court, on the recording of the verdict, may allow or refuse the jury to be polled, in his discretion; but, if there should be any good reason, a request by either party to test the unanimity of the jury by a poll should be allowed. *Hindrey v. Williams*, 371.

43. An instruction which is not based upon facts in evidence, nor upon the pleadings, may be ground for reversal. *Rara Avis G. & S. M. Co. v. Bouscher*, 385.

44. Under section 379 of the code all objections to the manner of certifying and returning a deposition are waived unless presented before the trial. *Walker v. Steel*, 388.

45. Before secondary evidence can be given of an instrument in writing, there must be proof of a diligent and *bona fide*, but unsuccessful, search for such instrument in the place where the same belongs, is generally kept, or most likely to be found. *Billin v. Henkel*, 394.

46. Under the statute an application for a change of venue must be made at the earliest moment. *Roberts v. The People*, 458.

47. When a want of information is set up as an excuse for the failure of a party to avail himself of a legal right within the time prescribed by law, no case for relief exists if it appears that the party voluntarily shut his eyes to the facts and remained wilfully ignorant of the requisite information. *Ib.*

48. The statute providing for a change of venue is only mandatory upon the court where the party applying has brought himself within the provisions. *Ib.*

49. The judge of a court cannot reasonably be required to postpone the business of his court in order to suit the convenience of lawyers who may desire to attend the sessions of other courts. *Ib.*

50. In an action by the assignee of a promissory note to recover on the note, the plaintiff, in stating his cause of action, omitted to state that the note sued on was due, by the terms thereof, at the time of bringing the action. The defendant interposed no objection on account of this omission till the plaintiff's testimony was closed, but pleaded that the assignment was fraudulent and made by the payee in order to escape a set-off which defendant had against him, and that the note was obtained through fraud, of which plaintiff had notice. *Held*, plaintiff could amend his complaint by the addition of an allegation that the note sued on was due "in six months after the day of the date thereof," and that the court could require defendant to answer such amended complaint *instantly*. *Brisbois v. Lewis*, 494.

51. Where an appeal is taken by the board of county commissioners in an action against them, the appeal bond must be executed in the name of the board, and not by the members individually. *Com'rs Boulder Co. v. King*, 542.

52. On appeal from a county court to a district court where the bond is insufficient, and the courts grant time to file an additional bond, if the new bond is adjudged insufficient, whether the appellant shall have further time to file a third bond rests in the sound discretion of the court, and on appeal such discretion will not be interfered with, except upon substantial and apparent grounds of abuse. *Ib.*

53. It is not enough that the evidence of the plaintiff shows a case that calls for some relief; to entitle himself to judgment he must show himself entitled to the relief called for by the facts

PRACTICE — *Continued.*

stated in the complaint. The allegations of the complaint, the evidence and the finding should correspond in legal intent. *Miller v. Hallock*, 551.

54. Plaintiff obtained judgment against defendant in a justice's court on two promissory notes. The case was appealed to the county court, and defendant asked leave to file his affidavit denying the genuineness of the signatures to the note, which defense he did not make before the justice. The county court denied the application and refused to consider the affidavit as a paper in the case. *Held* error, as there are no pleadings in the cases appealed from justices of the peace, and the affidavit properly raised the issue of the genuineness of the signatures. *Assig v. Pearsons*, 587.

55. Under the Civil Code no default can be entered for want of answer while a motion to quash the return upon the summons is pending and undetermined. *Chivington v. Colorado Springs Co.*, 597.

56. It is not error to require payment of the penalty adjudged upon overruling a demurrer or motion, under section 57 of the code, as a condition precedent to pleading over. *Ib.*

57. When the evidence is such that it would be the court's unquestioned duty to set aside a verdict for plaintiff, should one be returned, a verdict for defendant may be directed. *Ib.*

PRACTICE IN CRIMINAL CASES:

1. Where the evidence in a criminal case is wholly circumstantial, it is error to instruct the jury that they need not be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt. *Clare v. The People*, 122.

2. A charge containing two conflicting propositions of law upon a material point, one correct and the other incorrect, must be held erroneous, it being impossible to determine upon which proposition the jury relied. *Ib.*

3. To prevent reversal for error in the charge, it must appear that the prisoner could not have been prejudiced thereby. *Ib.*

4. Where, on an indictment for murder, the accused is convicted of voluntary manslaughter, he cannot be heard to say, on appeal, that such conviction is erroneous for the reason that no sufficient provocation was shown, and that, under the evidence, he should have been convicted of murder. *Murphy v. People*, 435.

5. It is not error, on an indictment for manslaughter, for the court to refuse to give cumulative instructions specifying repeatedly each material ultimate fact, and telling the jury they must find as to each, beyond a reasonable doubt. *Ib.*

6. On an indictment for murder, where there has been no attempt by the prosecution to show that the accused had ever been unkind to the deceased prior to the killing, it is not error in the court to refuse to admit cumulative evidence of acts of kindness by him. *Ib.*

7. Where a witness has testified that he is not in fear of giving his evidence, the admission of testimony by him that he was at one time in fear, though erroneous, is not ground for reversal. *Ib.*

8. On an indictment for murder, evidence that the accused repented the next day of his act and was forgiven by the deceased is inadmissible. *Ib.*

9. Error may not be assigned upon the refusal of the court to allow counsel for a prisoner to read the instructions of the court to

PRACTICE IN CRIMINAL CASES — *Continued.*

the jury. Adverse comments upon instructions to the jury are not permissible. The manner and extent to which counsel may proceed in argument rests in the sound discretion of the court. *Ib.*

10. In prosecutions for obtaining money or property under false representations, it is held not to be essential to constitute the offense charged that the pretenses by which the money or property is obtained were made directly to the party defrauded. *Roberts v. The People*, 458.

11. Where the evidence corresponds with the indictment in its general design and purport, a technical variance will not be fatal. *Ib.*

PRACTICE IN THE SUPREME COURT:

1. Errors, under the rule of this court, must be particularly specified. *Rice v. Goodridge*, 237.

2. Where a party stipulates that written instructions may not be given to the jury prior to the arguments, as provided by statute, he cannot be heard, upon appeal, to found any complaint upon a right thus waived. *Ib.*

3. The jury are judges of the credibility of witnesses, and the court will not review their findings upon questions of fact unless they are palpably against the weight of evidence. *Oppenheimer v. D. & R. G. R. Co.*, 320.

4. In an action to recover damages for the wrongful act of defendant, where the jury return a verdict for the defendant, objections to the instructions of the court relative to the measure of damages in case the jury should find for the plaintiff will not be considered upon appeal.

5. Upon writ of error, error cannot be assigned on an order made after judgment. *Polk v. Butterfield*, 325.

6. Where evidence is conflicting in a case tried to the court, and the record discloses that the finding and judgment are not against the weight of evidence, the judgment will not be disturbed by this court. *Miller v. Mickel*, 331.

7. Where a judgment has been rendered more than thirty days prior to the first day of the next term of the supreme court, appellant is not bound, under the act of 1885, to serve notice of appeal twenty days before such term, and file and docket the cause by the third day of such term, or procure an extension of the time for cause; he has the two months given by section 6 of the act within which to take his appeal. *Simonton v. Rohm*, 403.

8. Where the bill of exceptions on appeal from the county court is merely a statement of the proceedings, not signed by the county judge, it does not form a part of the record, and cannot be considered. *Gumm v. Metz*, 580.

9. Where evidence is very conflicting, contradictory and unsatisfactory, only the court in whose presence it is given can correctly estimate its value. An appellate court cannot. *Chubbourn v. Davis*, 581.

10. Errors in admitting oral testimony to vary a written instrument will not be noticed on appeal, unless the evidence is sent up with the record. *Wilson v. Gerhardt*, 585.

11. This court will not review a judgment appealed from on the evidence unless the bill of exceptions contains all the evidence. *First Nat. Bank v. Leppel*, 594.

See JURISDICTION, 1, 2, 3, 4, 5.

PRINCIPAL AND AGENT:

A policy of life insurance contained a provision that if the insured should become so far intemperate as to impair his health, or induce *delirium tremens*, it should become void. The insured allowed the policy to become forfeited, but, being indebted to the plaintiff, he transferred it to him, and the plaintiff arranged with the president of the company for its revival, and paid the sums required to keep the policy in force until the insured's death, which happened shortly after the revival. The president of the company knew the habits of the deceased at the time of the revival, and that he had become so intemperate as to injure his health. *Held*, that the knowledge of the president must be regarded as the knowledge of the company; that the company was bound by his acts in permitting the revival or renewal of the policy, and that the plaintiff could recover under the policy. *HELM, J.*, dissenting. *Pomeroy v. R. M. I. & S. Co.*, 295.

See AGENT.

PROMISSORY NOTES:

1. Due-bills and promissory notes are regulated, and the legal effect thereof determined, by statute in this state and not by the *lex mercatoria*. *Lee v. Balcom*, 216.

2. An instrument for the payment of money, in the following form:

"DECEMBER 20, 1882.

"Due P. Balcom the sum of two hundred and fifty dollars, value received, with interest at ten per cent. per annum after four months from date.

"GEORGE S. LEE,

"M. J. LEE, per GEORGE S. LEE,"

Held to be, in legal effect, a promissory note, and due and payable at the time of its execution. *Ib.*

3. In an action by the assignee of a promissory note to recover on the note, the plaintiff, in stating his cause of action, omitted to state that the note sued on was due, by the terms thereof, at the time of bringing the action. The defendant interposed no objection on account of this omission till the plaintiff's testimony was closed, but pleaded that the assignment was fraudulent and made by the payee in order to escape a set-off which defendant had against him, and that the note was obtained through fraud, of which plaintiff had notice. *Held*, plaintiff could amend his complaint by the addition of an allegation that the note sued on was due "in six months after the day of the date thereof," and that the court could require defendant to answer such amended complaint *instantly*. *Brisbois v. Lewis*, 494.

4. A bank with which a note is deposited by the payee, for collection, cannot refuse to return the note, or its proceeds, to the depositor, on the ground that it was given to defraud creditors of a third person, unless the bank itself is one of those creditors. *First Nat. Bank v. Leppel*, 594.

5. Under the statute (Gen. St. p. 142) all promissory notes and instruments in writing for the payment of money are negotiable, whether so expressed or not; and whether the particular instrument contains the words "or order," or equivalent words, or not, its legal effect is the same as if it did contain such words. *Cowan v. Hallack*, 572.

6. To constitute a good promissory note no precise words of contract are necessary provided they amount, in legal effect, to a promise to pay. *Ib.*

PROMISSORY NOTES — *Continued.*

7. Plaintiff sold to G. materials which G. used in constructing sidewalks on defendant's premises. At the request of plaintiff and G. defendant made and signed the following indorsement on the back of a bill of items of such materials prepared by plaintiff, and rendered to G.: "I hereby accept this bill, in compliance with the terms of contract and specification with Mr. H. A. Garvey, payable to E. F. Hullack thirty days after July 9, 1881." Held, that this indorsement was a negotiable instrument within the statute, and imported a consideration. *Ib.*

8. Such an indorsement is an unconditional promise to pay the money at a time named, and the defense that it was conditional on G.'s compliance with his contract with defendant, held bad on demurrer. *Ib.*

RAILROADS:

Where on the trial of an action for damages against a railroad company resulting from fire coming from an engine alleged to belong to defendant, the defendant denies that it operated the railroad running through plaintiff's farm, the uncontroverted evidence, by a station agent of defendant, that the defendant company ran its trains over the road running through plaintiff's farms, though not going clearly to the date of the fire; also that defendant sent him, soon after the fire, to see plaintiff respecting it, and to report concerning it,—is sufficient to establish the fact that defendant was operating the road at the time of the fire, and regarded itself as liable for damages. *Union P. R. R. Co. v. Jones*, 379.

RAILROAD TICKETS:

Where the plaintiff sues for damages for wrongful ejectment from a train upon which he was traveling by virtue of a mileage ticket, and the defendant pleads that the ticket was issued upon the condition, of which plaintiff had notice, that it was not available over that portion of the road upon which he was traveling, evidence that the defendant had sold the same kind of ticket to another person about the time of the sale to plaintiff, and that such ticket was used without objection by the company, is inadmissible. *Oppenheimer v. D. & R. G. R. Co.*, 820.

RATIFICATION: See AGENT, 4, 5.

READING OF BILLS:

Under section 22, article V, of the constitution as amended, the reading of a bill at length in committee of the whole, together with the reporting and recording of the fact upon the journal, may be treated as one reading of the bill. *Senate Rule*, 641.

REASONABLE DOUBT: See INSTRUCTIONS, 1.

RECALLING BILLS:

There is nothing in the constitution forbidding the legislature by concurrent resolution requesting the return of a bill in the hands of the governor, nor forbidding a reconsideration and amendment of a bill thus returned. 630.

REFERENCE:

1. Good practice requires that an order of reference should state whether it was made on the agreement of parties, upon the application of one party, or on the motion of the court. *Terpening v. Holton*, 306.

REFERENCE — *Continued.*

2. In an action in which the circumstances authorizing a compulsory reference under the Code of Civil Procedure do not exist, where the order fails to show that the reference was by consent, and it appears from the transcript that the appellant did not object to the validity of the order or the jurisdiction of the referee, either before the referee, or in court before the entry of judgment upon his report, and that he appeared before referee and proceeded to the trial of the matters submitted, the appellant's conduct will operate as a waiver of his right to object, and the reference will be upheld on appeal. *Ib.*

3. Where a reference covers the whole issue before the court, the clerk may enter judgment upon his report without any order of the court; and previous to the act of April 10, 1885, no notice was required before doing so. *Ib.*

4. Evidence of the contents of a deed is not admissible until the fact of its loss has been established. *Ib.*

5. Where the proof already offered has revealed that the sale of a mining claim relied upon was evidenced by a written instrument, the party relying upon the sale must produce the writing or account for its absence, and evidence of a parol sale is not admissible. *Ib.*

6. That part of the Code of Civil Procedure authorizing the clerk to enter judgment upon a referee's report is not, as an attempt to make the finding of the referee the finding of the court without its submission to the court, a violation of article 6, section 1, of the state constitution relative to the judicial power. *Ib.*

RELEASE:

A release is not to be implied from the mere fact of assent to the assignment of a lease, and the assignment of a lease does not annul the lessee's obligation on his express covenants to pay rent, even though the lessor has accepted the assignee as his tenant and collected rent from him: *Wilson v. Gerhardt*, 585.

RELIEF: See PLEADING, 26.

RELOCATOR:

The relocator of an abandoned mining claim has the same length of time to perform each of the acts of location subsequent to discovery as the original locator. *Pelican & Dives M. Co. v. Snodgrass*, 839.

RENT:

A covenant to pay rent is not personal but runs with the land; the grantee of the reversion stands in the same position to the tenant that the lessor did before he parted with the reversion. *Allen-spach v. Wagner*, 127.

REPLEVIN:

Where the defendant, in an action of replevin before a justice of the peace, has contested the case upon the merits, on a claim of a superior right to the property, and the judgment has been given against him, he cannot maintain on appeal that, as an innocent purchaser, replevin will not lie against him without a demand and his refusal to deliver up the property; a demand is not necessary where the defendant claims the same right, both as to ownership and possession, as the plaintiff claims, and that his right is derived from the same source. *Lamping v. Keenan*, 390.

RESCISSION OF CONTRACTS: See CONTRACTS, 16.

RULES OF COURT: See PRACTICE, 38.

SEWERS: See MUNICIPAL CORPORATIONS.

STAKEHOLDER: See INTEREST, 2.

STATE INSTITUTIONS:

The location of the Agricultural College and certain other institutions having been fixed by the constitution, such location cannot be changed except by amendment of the constitution. *Senate Resolutions*, 626.

STATUTES:

1. In the construction of statutes, general terms are to receive such reasonable interpretations as leave the provisions of the statute practically operative. *Electro-M. M. & D. Co. v. Van Auker*, 204.

2. All statutes *in pari materia* are to be construed together. Repeals are not favored. Whenever the earlier and the later provisions of the law can stand together they will be permitted to do so. *Kollenberger v. The People*, 233.

3. When a statute is adjudged to be unconstitutional it is as if it had never been. And what is true of an act void *in toto* is true also as to any part of an act which is found to be unconstitutional. *Coulter v. Routt County*, 258.

4. The legislature has no constitutional power to provide by law that the terms of the district court of a single county shall be held every year at a place designated in the act, which is not and never has been the county seat of such county. *Ib.*

See CONSTITUTIONAL LAW.

STATUTES — FOREIGN:

Courts do not take judicial notice of the statutes of other states. They must be set out in the pleadings, and proved like other facts. *Polk v. Butterfield*, 325.

STATUTE OF FRAUDS:

1. It is a familiar rule that extrinsic evidence is not admissible, either to contradict, add to, subtract from, or vary the terms of a written instrument. The rule applies with greater force to all instruments required, by the statute of frauds, to be in writing. *Randolph, Adm'r, v. Helps*, 29.

2. As to a writing not within the statute of frauds, where the effect of a defeasance is claimed for a provision in an instrument, the same rule applies. *Ib.*

3. Where the words of a contract are free from ambiguity in themselves, and no doubt or difficulty arises as to their meaning or application, they are to be construed and applied in their plain and general acceptance. *Ib.*

4. All oral negotiations or stipulations between the parties which preceded or accompanied the execution of the instrument are to be regarded as merged in it, and the latter is to be treated as the exclusive medium of ascertaining the agreement to which the contractors bound themselves. Parol evidence is admissible to explain and apply the writing, but not to add to it or vary its terms. *Ib.*

STATUTE OF FRAUDS — *Continued.*

5. Under the statute of frauds of this state the same evidence is necessary as under the statute of 29 Car. II., c. 8, to establish a trust. *Bohm v. Bohm*, 100.

6. The general rule is that a promise by a grantee to hold the land for the grantor, or to reconvey it to him, is in effect a declaration of trust and directly within the mischief which the statute of frauds was intended to prevent. The mere circumstance that a confidence has been violated is not sufficient to exclude the operation of the statute. *Ib.*

7. To exclude the operation of the statute on the ground of fraud, where an oral agreement is alleged as a foundation of the trust, it must appear that the promise was used as a means of imposition or deceit, and if the case, taken as a whole, is one of fraud, the promise may be received in evidence as one of the steps by which the fraud was accomplished. *Ib.*

8. The settled doctrine is that the statute of frauds does not apply to such a case, since the trust arises out of the fraud, and is consequently excepted from the operation of the statute. The same rule applies where a person, occupying a fiduciary relation to the owner of real estate, takes advantage of the confidence reposed in him by virtue of such relation to acquire an absolute conveyance without consideration by verbal agreement, which he promises to reduce to writing. *Ib.*

9. Under the statute of frauds of this state (Gen. St. § 1523), the sale of chattels must be followed by actual and continued change of possession. *Bassinger v. Spangler*, 175.

10. The statute admits of no excuse for leaving personal chattels, capable of manual delivery and removal, in the apparent possession of the vendor; nor does it admit of a construction whereby there may be a joint or concurrent possession in both vendor and vendee; nor can a case be taken out of the statute, nor can the statute be satisfied, by proving that the sale was *bona fide*. *Ib.*

11. Unless the purchaser can show such a substantial compliance with the terms of the statute as affords visible notice to the community of a change in the ownership of the goods, the transaction constitutes a fraud in law, and, as such, must be held to be void as to creditors and subsequent purchasers in good faith of the vendor. *Ib.*

12. The recording of a bill of sale, the law not requiring or authorizing the recording of such instruments, is no notice to creditors of the vendor. *Ib.*

13. Where the uncontradicted evidence of the plaintiff fails to show such a compliance with the statute as would sustain a verdict in his favor, it is proper for the court to direct a verdict for the defendant. *Ib.*

14. A voluntary transfer by a debtor to one of his creditors of certain horses and mules and wagons used by him at his saw-mill, in trust to sell the same, and to apply the proceeds in payment of certain preferred creditors, the balance being accepted by the assignee in settlement of his own claim, is not void as to other creditors under the statute (Gen. St. § 1523), where a bill of sale of the property was executed by the debtor, and delivered to the assignee, and formal possession of the property surrendered to him one day, and the property removed by the assignee from the mill the next. In replevin by such assignee against creditors who attached the property after it had been removed from the mill, *held* error to take the case from the jury. *Bailey v. Johnson*, 365.

15. Where the statute of frauds was pleaded to an alleged con-

STATUTE OF FRAUDS—*Continued.*

tract for the sale of goods, and no note or memorandum in writing having been made and subscribed by the parties, and no part of the goods, or the evidence of them, having been accepted and received by the purchaser, nor any part of the purchase money paid at the time of the transaction, *held*, that the contract of sale was within the statute, and void. *Billin et al v. Henkel et al.*, 394.

16. A void contract, under the statute, may not be rendered valid by performance on the part of one party only; the vendee must not only receive but accept the goods bargained for, in order to pass the title. *Ib.*

STATUTE OF LIMITATIONS:

1. Under the statute (Gen. Stats. sec. 2174), bills for relief on the ground of fraud must be filed within three years after the discovery, by the aggrieved party, of the facts constituting such fraud, and not afterwards. *Bohm v. Bohm*, 100.

2. Where the defendant alleged in her cross-complaint that she did not discover the fraud upon which she sought relief until within three years of the filing of the cross-complaint, the allegation standing unimpeached, the original transaction being between a mother and her son, and under other circumstances stated in the cross-complaint, *held*, on demurrer, that the case made by the cross-complaint was not barred by the statute of limitations. *Ib.*

STREETS:

1. Cities and towns incorporated under Gen. St. ch. 109, p. 958, are invested with exclusive control over their streets, and come within the rule which holds such cities and towns liable for damages caused by a failure to keep their streets in a safe condition for travel, whether such liability is specifically imposed by the act of incorporation or not. *City of Boulder v. Niles*, 415.

2. In an action against a city to recover damages for a personal injury received by the plaintiff by falling on the defendant's sidewalk, owing to the negligence of defendant in not removing ice and snow which had formed a ridge thereon, the question whether the defendant should have known of such obstruction, and removed it, is one for the jury to determine from all the circumstances,—the extent of the snow-fall, condition of the weather thereafter, amount of travel on the streets, and the lapse of time between the snow-fall and the accident. *Ib.*

3. In such case, an instruction which states that, if the jury believe that plaintiff was injured owing to the negligence of the defendant in not removing an obstruction on its sidewalk which plaintiff may have proven was there, they may find for plaintiff, is erroneous, in that it does not require them to find that plaintiff was using ordinary care in walking on such sidewalk; and the fact that the law on the subject was correctly given in another instruction is not material, as it cannot be known by which instruction the jury was governed. *Ib.*

4. In order to hold a city liable for an injury received by falling over an obstruction on its sidewalk, it must be shown, not only that there was such an obstruction, and that plaintiff was injured thereby, as alleged, without negligence on his part, but also that defendant had notice of such obstruction, or that it had existed for such a length of time as to import notice; and that defendant had not used reasonable diligence in removing such obstruction. *Ib.*

SUPREME COURT:

1. Under the constitution the principal jurisdiction of the supreme court is first appellate, and second superintending. But there is also conferred upon it a limited original jurisdiction. *Wheeler v. N. C. Irrigation Co.*, 248.

2. The phrase, "and other original and remedial writs," in section 8, article VI, of the constitution, includes writs belonging to the same class as those specifically named in said section. *Ib.*

3. All of the writs referred to in said section 8, save the writ of injunction, were prerogative writs of the common law, and the writ of injunction as therein provided for is made a *quasi* prerogative writ. *Ib.*

4. Some of the writs mentioned, including *mandamus*, have been largely shorn, in this country, of their prerogative character. But original jurisdiction over these writs should be taken by this court only in cases involving questions *publici juris*, and the writs from this court should in general be put only to prerogative uses. Except in cases presenting some peculiar exigency they should only issue when the interest of the state at large is directly involved, and where such interest is the principal and not a collateral question. *Ib.*

5. Cases where these writs issue from this court should be brought in the name of the people, and it is the better practice that they be instituted by the attorney-general, or with his consent, or that his refusal to act or to consent be shown. *Ib.*

TAXATION—STATE PURPOSES:

1. Under the constitution of this state (art. 10, § 11), providing that, when the assessed value of property in the state shall have reached \$100,000,000, the tax for "state purposes" shall not exceed four mills per dollar of valuation, rates of taxation for state purposes aggregating five and seventeen-thirtieths mills per dollar, declared after the assessed value of property in the state had reached \$100,000,000, are in excess of the constitutional limit, although only four mills thereof is declared to be for state purposes, and the remainder is for the support of state institutions authorized by the constitution. *People ex rel. v. Scott*, 422.

2. Any legitimate expenditure of the state, necessary to be provided for by a state tax, is a "state purpose," and the tax to be provided is a tax for a "state purpose." *Ib.*

3. The act of April 7, 1885, declaring a tax of four mills for state purposes, does not repeal by implication Gen. St. §§ 15, 2243, 2444, 2881, 3108, 3167, 3456, declaring rates of taxation for various state institutions, but those rates should be extended in separate columns of the tax list, and deducted from the aggregate rate of four mills, and the remainder of that rate extended in the column of the list in which assessments for taxes to be applied to the expenses of the state government are placed. *Ib.*

4. Constitutions are adopted as a whole, and it is a rule of construction that a clause which, standing by itself, might seem of doubtful import, may be made plain by comparison with other sections of the same instrument. *Ib.*

5. Legal presumptions are in favor of the correctness of contemporaneous legislative expositions of a constitutional provision, but such construction can never abrogate the text, it can never narrow its true limitations, nor enlarge its natural boundaries. *Ib.*

TAXATION OF MINING CLAIMS:

The constitution does not authorize the general assembly to assess any class of property for taxation. This must be done by the proper officer upon a just valuation. *House and Senate Bills*, 635.

TAXATION OF PATENTED MINING LANDS:

1. Legislation is necessary to render effective section 3 of article X of the constitution, providing for the taxation of patented mining lands. *House Resolution*, 622.
2. The adoption of the amendment of section 3 of article X of the constitution did not extend the period of exemption limited for the taxation of mines and mining property beyond the period provided in the original section. *House Bill 13*, 623.

TENANT:

1. A covenant to pay rent is not personal but runs with the land; the grantee of the reversion stands in the same position to the tenant that the lessor did before he parted with the reversion. *Alenspach v. Wagner*, 127.
2. Where a tenant holds a lease which is to expire upon the sale of the leased premises, and the new owner under a sale of the land offers to continue him as tenant, under the lease, the tenant cannot recover damages for an eviction by the grantee, the eviction being in consequence of the non-payment of rent under the lease. *Ib.*
3. Nor is it sufficient in such case for the tenant to say that the sale was fraudulent and void. A court will not inquire into a fraud except at the instance of the party injured by it. *Ib.*

TENANT IN COMMON:

An action by a tenant in common against a co-tenant, for contribution for improvements, does not lie, except upon an agreement to contribute. *Neuman v. Dreifurst*, 228.

TENDER:

Unless the tender of a sum admitted to be due be unconditional, interest may be recovered thereon. *Higgins v. Armstrong*, 38.

TITLE OF STATUTE:

Where the title of a statute contains but one general subject, the addition in the title of subdivisions under that subject does not render the act obnoxious to objection under section 21, article V, of the constitution. *Clare v. The People*, 122.

TRESPASS:

1. Legal possession by a railroad company of the right of way over land, and authority to construct and operate its railroad thereon, do not authorize or sanction a direct intrusion and trespass upon adjacent private property. *G., B. & L. R'y Co. v. Eagles*, 544.
2. In general if a voluntary act, lawful in itself, may naturally result in the injury of another, or the violation of his legal rights, the actor must at his peril see to it that such injury or such violation does not follow or he must expect to respond in damages therefor; and this is true regardless of the motive or the degree of care with which the act is performed. *Ib.*
3. But such injury must be the proximate consequence of the act complained of. And if there be no intermediate efficient cause the act must be considered as reaching to the effect. *Ib.*
4. Where damages claimed result through the frightening away of guests from plaintiff's hotel by the blasting of defendant, evidence of injuries to adjacent buildings, caused by rocks cast upon them through such blasting, is competent as bearing upon the reasonableness of the fears of injury entertained by such guests. *G., B. & L. R'y Co. v. Doyle*, 549.

TRUSTS:

1. The general rule is that a promise by a grantee to hold the land for the grantor, or to reconvey it to him, is in effect a declaration of trust and directly within the mischief which the statute of frauds was intended to prevent. The mere circumstance that a confidence has been violated is not sufficient to exclude the operation of the statute. *Bohm v. Bohm*, 100.

2. To exclude the operation of the statute on the ground of fraud, where an oral agreement is alleged as a foundation of the trust, it must appear that the promise was used as a means of imposition or deceit, and if the case, taken as a whole, is one of fraud, the promise may be received in evidence as one of the steps by which the fraud was accomplished. *Ib.*

3. The settled doctrine is that the statute of frauds does not apply to such a case, since the trust arises out of the fraud, and is consequently excepted from the operation of the statute. The same rule applies where a person, occupying a fiduciary relation to the owner of real estate, takes advantage of the confidence reposed in him by virtue of such relation to acquire an absolute conveyance without consideration by verbal agreement, which he promises to reduce to writing. *Ib.*

4. Whenever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the party so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed. *Ib.*

5. Under the statute of frauds of this state the same evidence is necessary as under the statute of 29 Car. II., c. 3, to establish a trust. *Ib.*

6. In the absence of fraud, an absolute deed will not be construed as creating a constructive or resulting trust. *Farrand v. Beshoar*, 291.

7. The cashier of an unincorporated bank, who is also a partner, and is alone authorized to transact all the business, and in whose name contracts are habitually made for the bank, may become by virtue of such a contract the trustee of an express trust, and under the code may sue thereon in his own name. *Merchants' Bank v. McClelland*, 608.

8. An antecedent debt may constitute good and sufficient consideration for the contract of assignment in connection with a negotiable instrument. *Ib.*

9. The rule that the assignee of a negotiable instrument for value in good faith before maturity may recover against the maker is not affected by the circumstance that such assignee is in possession of facts sufficient to arouse suspicion, and is negligent in not pursuing such information to discover the fraud or illegality to which the facts may seem to point. *Ib.*

10. The expression "due course of trade" is said to be when the holder has given for the note his money, goods or credit at the time of receiving it, or has on account of it incurred some loss or liability. *Ib.*

UNLAWFUL DETAINER:

In an action of unlawful detainer, where the plaintiff claimed under a decree in connection with a certificate of purchase, and the only allegation in the complaint concerning the nature or pro-

UNLAWFUL DETAINER—*Continued.*

visions of the decree was "that under and by virtue of being the owner of said certificate, and under the power and authority of the district court of said county, and the decree upon which said certificate of sale was issued, this plaintiff is entitled to the possession of said lode, with all appurtenances," held to be simply a conclusion of law, and not sufficient to constitute a cause of action. *Laffey et al. v. Chapman*, 304.

ULTRA VIRES:

1. In an action against a corporation the plea of *ultra vires* is not to be understood as an absolute and peremptory defense in all cases of excess of power without regard to other circumstances and considerations. The plea is not to be entertained when its allowance will do great wrong to innocent third persons. *Denver Fire Ins. Co. v. McClelland*, 11.

2. If a private corporation has accepted and retained the full benefit of a contract which it had no power to make, the same having been fully performed by the other party thereto, and if the transaction is of such a nature that the party thus performing will suffer manifest hardship and injustice, unless permitted to maintain his action directly upon the contract, no other adequate relief being at his command, the defense of *ultra vires* may be disallowed. *Ib.*

VENUE:

1. Under the statute an application for a change of venue must be made at the earliest moment. *Roberts v. People*, 458.

2. When a want of information is set up as an excuse for the failure of a party to avail himself of a legal right within the time prescribed by law, no case for relief exists if it appears that the party voluntarily shut his eyes to the facts and remained wilfully ignorant of the requisite information. *Ib.*

3. The statute providing for a change of venue is only mandatory upon the court where the party applying has brought himself within the provisions. *Ib.*

VETO POWER—SPECIAL SESSION OF GENERAL ASSEMBLY:

1. A bill being vetoed by the governor, and the general assembly failing to pass it, notwithstanding the veto, existing legislation upon the subject-matter of the bill remains undisturbed.

2. The necessity for the convention of the general assembly in special session, under section 9, article IV, of the constitution, rests entirely with the executive. 642.

VERDICT:

1. A general verdict is according to the course of the common law, in conformity to which all trials for criminal offenses are to be conducted, except where a different mode is pointed out. *Kollenberger v. The People*, 238.

2. When the evidence is such that it would be the court's unquestioned duty to set aside a verdict for plaintiff, should one be returned, a verdict for defendant may be directed. *Chivington v. Colorado Springs Co.*, 597.

WAREHOUSEMAN:

1. Where goods deposited with a warehouseman were stolen, and the depositor demanded payment for them from him, and he finally agreed to pay a less sum than that claimed, in settlement, but paid only a part of it, and suit was brought for the balance,

WAREHOUSEMAN — *Continued.*

held, that it was immaterial to the issue that he was not originally liable as warehouseman, the suit being brought upon the compromise agreement. *Swen v. Green*, 358.

2. A compromise of a doubtful right is sufficient foundation for an agreement, and it is no defense to say that it was without consideration. *Ib.*

WATER RIGHTS:

1. Where the several owners of two irrigating ditches entered into an agreement to construct a new ditch to supersede the old ditches, and upon the trial of the question what proportion of water carried through the new ditch each one was entitled to, it appeared by the weight of evidence that nothing was said in the agreement about the division of the water, *held*, that the decree of the court adjudging that each party to the agreement was entitled to the same share of the water conveyed through the ditch as he owned of the new ditch itself was erroneous, as being against the weight of evidence. *Held, further*, that the finding of the court that the appropriations of water by the different parties were to be referred to the date of the contract respecting the new ditch, was erroneous, it not appearing that priorities had been waived by the contract respecting the new ditch. *Rominger v. Squires*, 327.

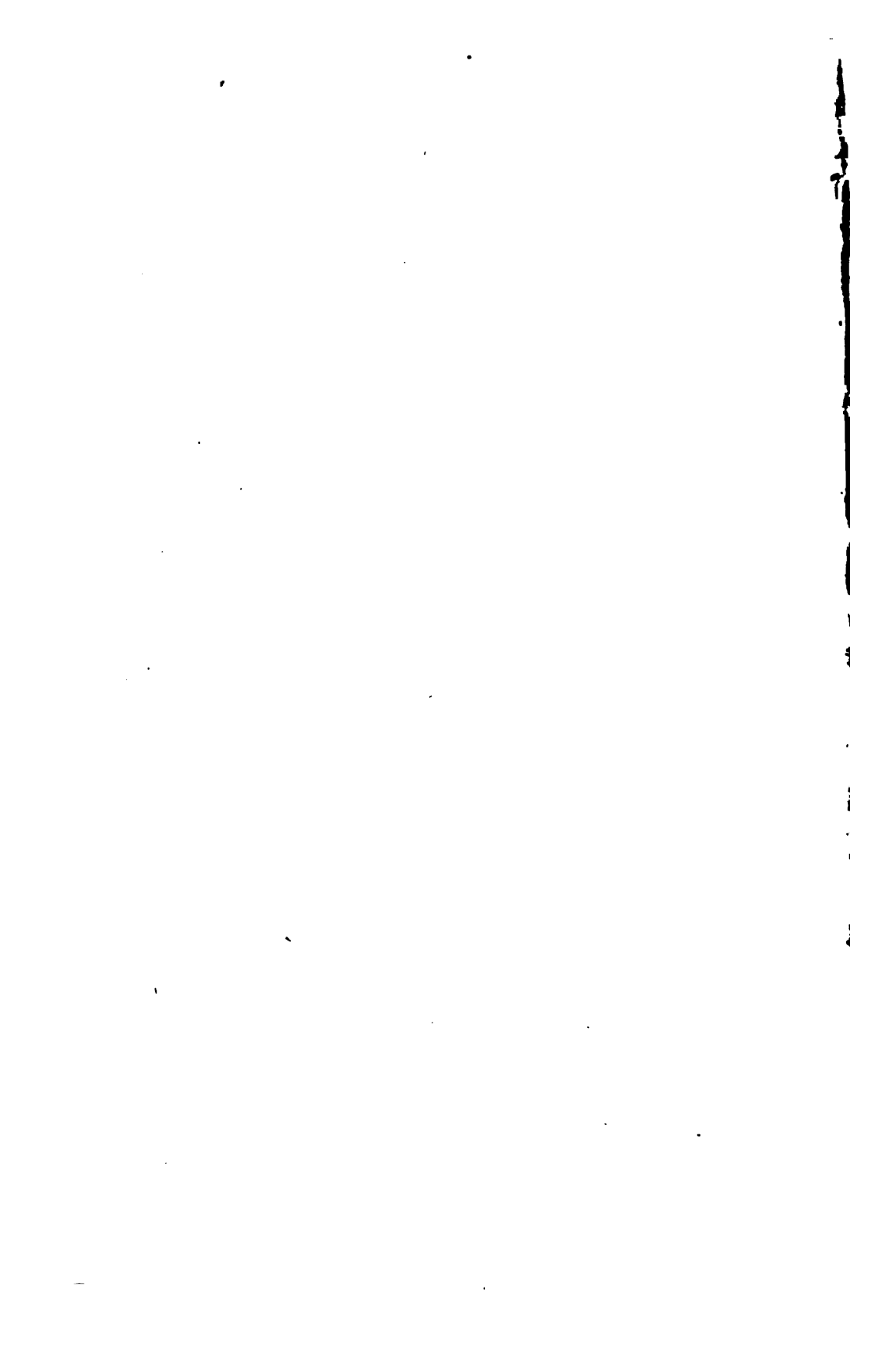
2. In an action on an injunction bond to recover damages for loss of plaintiff's crops by reason of his being restrained from using the water in a certain ditch, the evidence showed that there was a great scarcity of water, and that it could not have reached plaintiff's land, whereupon a verdict for nominal damages was rendered. *Held*, that such verdict would not be disturbed. *Mack v. Jackson*, 536.

3. Where a party sues for damages caused by being restrained from using the water from a certain ditch, if it is shown that he could have obtained sufficient water from another source, he will not be entitled to receive a greater sum than he would have had to expend to obtain water from such source. *Ib.*

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